83-255

No. - .

In the Supreme Court of the United States.

OCTOBER TERM, 1983.

ALBERT B. BENSON AND VIKTOR E. BENSON,
PETITIONERS,

v.

COMMONWEALTH OF MASSACHUSETTS,
RESPONDENT.

Petition for a Writ of Certiorari to the Supreme Judicial Court for the Commonwealth of Massachusetts.

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Questions Presented for Review.

1. Whether the doctrine of collateral estoppel bars the prosecution of the petitioners for the crime of conspiracy to commit arson where the Commonwealth, having no direct evidence of an agreement to commit arson, intends to prove a conspiracy to commit arson by introducing evidence substantially identical to that which resulted in petitioners' acquittals on the substantive charges of arson and breaking and entering with the intent to commit arson?

2. Whether, alternatively, the doctrine of collateral estoppel bars the relitigation at the trial of the conspiracy indictment of all facts and issues that, if believed by a jury, would necessarily tend to show that the petitioners committed the substantive offenses of arson and breaking and entering with intent to commit arson and which were necessarily determined against the Commonwealth by the prior acquittals of the petitioners?

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No. - .

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and VIKTOR E. BENSON,
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v.

COMMONWEALTH
OF MASSACHUSETTS,
Respondent.

Petition for a Writ of Certiorari to the Supreme Judicial Court for the Commonwealth of Massachusetts.

The petitioners respectfully pray that a writ of certiorari issue to review the decree and opinion of the Supreme Judicial Court for the Commonwealth of Massachusetts entered in this proceeding on June 15, 1983.

Opinions Below.

The opinion of the Supreme Judicial Court for the Commonwealth of Massachusetts is reported at 389 Mass. 473 (1983) and is set forth at page 1a in the appendix. The report of the trial court is set forth at page 48a in the appendix.

The petitioners' claims were presented in other state court proceedings below. The lower court opinions are not reported but are set forth at pages 11a, 26a, and 29a in the appendix.

The petitioners' claims were raised in the federal courts pursuant to 28 U.S.C. §§ 2241 and 2254, 42 U.S.C. § 1983 and 28 U.S.C. § 1343(3). The opinion of the United States District Court for the District of Massachusetts is reported at 507 F. Supp. 975 (D. Mass. 1981) and is set forth at page 31a in the appendix. The opinion of the United States Court of Appeals for the First Circuit is reported at 663 F.2d 355 (1st Cir. 1981) and is set forth at page 39a in the appendix.

Jurisdiction.

The decree of the Supreme Judicial Court for the Commonwealth of Massachusetts was entered on June 15, 1983, and this petition for certiorari was filed within sixty days of that date. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257(3).

Constitutional and Statutory Provisions Invoked.

The Fifth Amendment to the United States Constitution provides in pertinent part: "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb."

Statement of the Case.

The petitioners, previously acquitted of the substantive offenses of arson and breaking and entering with intent to commit arson, now await trial on the charge of conspiracy to commit the very same arson.

The petitioners filed a motion to dismiss seeking to bar their prosecution on the conspiracy charge or, alternatively, to bar the relitigation of all facts and issues that were necessarily determined in their favor at the prior trial. The motion to dismiss was founded upon the doctrine of collateral estoppel as embodied in the double jeopardy clause of the Fifth Amendment (A. 86a). The trial court, stating that the claims were "both so important and so doubtful" as to require an appellate court's decision prior to trial, reserved and reported the case to the Massachusetts Appeals Court (A. 48a). The case was then transferred to the Supreme Judicial Court for direct appellate review by that court. The Supreme Judicial Court held that the doctrine of collateral estoppel did not bar the prosecution of the conspiracy charge or in any way limit the evidence the Commonwealth could introduce at the trial. The case was ordered to stand for trial (A. 1a).

The facts material to the consideration of the questions presented for review are as follows:

On the evening of December 20, 1978, Massachusetts State Police officers observed the petitioners, Albert B. Benson and Viktor E. Benson, enter a five-story commercial building in Boston, Massachusetts. The officers observed several other persons entering and exiting the building. The petitioners were arrested upon their departure from the building. Shortly thereafter, a fire erupted in an office on the second floor.

The petitioners were each indicted on January 11, 1979, on identical charges of (1) arson, (2) breaking and entering with intent to commit arson, and (3) conspiracy to commit arson.

The arson indictments in pertinent part state: "on December 20, 1978, did wilfully and maliciously cause to be burned, and did aid, counsel and procure the burning of a building situated at 101-109 State Street, Boston . . ." (A. 54a, 55a).

The conspiracy to commit arson indictment in pertinent part states: "on December 20, 1978, and on divers and other dates, did conspire together to wilfully and maliciously cause to be burned, and did conspire together to aid, counsel and procure the burning of a building situated at 101-109 State Street, Boston . . ." (A. 53a).

In pre-trial pleadings filed in the trial court, the Commonwealth has admitted that:

1. It has no direct evidence of a conspiracy to commit arson;
2. It has no direct evidence of a conspiracy existing on any date other than on December 20, 1978;
3. It has no statements to support an agreement to commit arson;
4. It is unable to specify the names of any co-conspirators;
5. The acts in furtherance of the conspiracy were that on December 20, 1978, the defendants did enter 101-109 State Street, Boston, and did aid, counsel, procure and cause that building to burn (A. 62a, 64a).

A trial was commenced on the indictments charging arson and breaking with intent to commit arson on September 11, 1979.[1] The petitioners were acquitted on each such indictment.

The petitioners filed a motion to dismiss the remaining conspiracy indictment. After a hearing, the trial court denied the

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[1] At the time, the Commonwealth was statutorily prohibited from trying the substantive crimes at the same time it tried the defendants for conspiracy to commit the same substantive offenses. Mass.G.L. c. 278, § 2A, repealed by St. 1979, c. 344, § 43 (A. 99a).

motion, based in part on numerous representations by the Commonwealth that additional evidence of a common scheme would be introduced against the petitioners in the trial on the conspiracy indictment (A. 11a).

In March, 1980, the Commonwealth made its sole attempt to supplement its pre-trial pleadings on the issue of the additional evidence to be introduced in support of the conspiracy indictment. At that time, the Commonwealth indicated that it intended to introduce evidence of three other fires and the alleged involvement of the petitioners therein. In response, the petitioners successfully moved for an order barring the Commonwealth from introducing such evidence (A. 4a).

The petitioners filed a motion *in limine* seeking to preclude the Commonwealth from relitigating at the conspiracy trial all facts and issues necessarily determined against it by the acquittal of the petitioners on the indictments which charged them with arson and breaking and entering with intent to commit arson. The petitioners also filed a renewed motion to dismiss.[2] On June 23, 1980, both motions, grounded upon the doctrine of collateral estoppel, were denied without prejudice to the petitioners' right to renew their contentions during the course of trial proceedings (A. 26a).

The petitioners then filed an application for leave to file an interlocutory appeal in the Supreme Judicial Court of Massa-

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[2] At the court's request, the Commonwealth filed a trial memorandum which the court treated as a summary of the evidence which the Commonwealth intends to introduce at the trial on the conspiracy indictment (A. 82a). That memorandum together with the Commonwealth's pleading of March 14, 1980, which the court had held to contain inadmissible evidence constitute the *only* two documents of record which even arguably suggest the nature of the evidence to be introduced by the Commonwealth at the conspiracy trial. In addition, counsel of record for the petitioner Albert B. Benson filed an affidavit which recited the evidence which the petitioners believed the Commonwealth would introduce at trial. The trial court treated that affidavit as a more precise recitation of the proposed testimony of the Commonwealth's witnesses (A. 72a).

chusetts. After a hearing on September 24, 1980, the application was denied without prejudice to the petitioners' right to renew their contentions during the course of the trial proceedings (A. 29a).

The petitioners then filed a two-count complaint in the United States District Court for the District of Massachusetts. Count I was a petition for a writ of habeas corpus pursuant to 28 U.S.C. §§ 2241 and 2254, and Count II consisted of a complaint for declaratory and injunctive relief pursuant to 42 U.S.C. § 1983 and 28 U.S.C. § 1343(3). Both claims were grounded on the claim of collateral estoppel.

While the district court did conclude that the petitioners had exhausted their state remedies, it denied their petition for habeas corpus and complaint for injunctive relief (A. 31a). However, the district court did rule that: "the Commonwealth will be foreclosed from claiming or arguing that the petitioners set the fire in the building or that they did aid, counsel or procure the burning of the building . . ." (A. 37a).

On appeal,[3] the United States Circuit Court of Appeals for the First Circuit vacated in part and affirmed in part the decision of the district court (A. 39a). That portion of the district court's decision which foreclosed the Commonwealth from offering specific evidence at trial was vacated. That portion of the district court's decision which denied the writ of habeas corpus was affirmed, the court holding that the petitioners had not exhausted their stated remedies.[4]

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[3] A certificate of probable cause was issued by the district court pursuant to 28 U.S.C. § 2253, Rule 22 of the Federal Rules of Appellate Procedure, and Rule 17 (Habeas Corpus) of the Rules of the United States Court of Appeals for the First Circuit.

[4] The court stated in relevant part that:

> There can be no question here that the application for leave to file a petition for interlocutory appeal did not raise precisely the same issue presented in this petition for a writ of habeas corpus. Despite the wording of the Massachusetts Rules of Criminal Procedure which ex-

The petitioners then filed a petition for relief by the Supreme Judicial Court pursuant to its supervisory powers contained in Mass.G.L. c. 211, § 3. After a hearing, a single justice continued the action, pending the filing of a motion in the trial court to reserve and report a motion to dismiss. On May 17, 1982, the petitioners filed with the trial court a motion to dismiss and the case was reserved and reported by the trial court on July 17, 1982 (A. 48a).

The Supreme Judicial Court held that "the principles of collateral estoppel are inapplicable to the evidentiary facts of the prior trial because of the tenuous and speculative relationship between the result in the prior proceeding and the evidence proposed to be presented in the subsequent prosecution" (A. 9a).

The petitioners seek to have the validity of the Supreme Judicial Court's decision reviewed by this Court.

Reasons for Granting the Writ.

I. The Decision of the Supreme Judicial Court for the Commonwealth of Massachusetts is in Conflict with the Applicable Decisions of the Supreme Court.

The petitioners argued below that, having been acquitted previously on the substantive charges of arson and of breaking

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plicitly recognize interlocutory appeal only for decisions on suppression motions, appellants could — and still can — appeal to the Massachusetts Supreme Judicial Court under its supervisory power. *See Mass. Gen. Laws* ch. 211 § 3; *Fadden* v. *Commonwealth*, 376 Mass. 604, 382 N.E.2d 1054, 1056 (Mass. 1978). We therefore find that the unusual circumstances justifying jurisdiction over a pre-trial petition for a writ of habeas corpus do not exist in this instance.

663 F.2d at 359.

and entering with the intent to commit arson, the doctrine of collateral estoppel bars their prosecution for the crime of conspiracy to commit arson in that in each case the core of the prosecutor's case is the same. The Supreme Judicial Court's decision that the doctrine of collateral estoppel is not applicable to the within action "because of the tenuous and speculative relationship between the result in the prior proceeding and the evidence proposed to be presented in the subsequent prosecution . . ." is not in conformity with the principles enunciated by this Court in *Sealfon* v. *United States*, 332 U.S. 575 (1947) and *Ashe* v. *Swenson*, 397 U.S. 436 (1970). See also *Harris* v. *Washington*, 404 U.S. 55 (1971); *Turner* v. *Arkansas*, 407 U.S. 364 (1972); and *United States* v. *Kramer*, 289 F.2d 909 (2d Cir. 1961).

The Supreme Judicial Court held that the general verdicts of not guilty returned by the jurors at the trial of the substantive offenses made it impossible to determine with certainty what the jury in the earlier prosecution had decided. The court suggested that the jurors "may have acquitted the [petitioners] because they concluded that the fire was not set or because they concluded that there was no active participation by the [petitioners] with the person who set the fire" (A. 9a).

This reasoning is not in accord with the evidence presented at the prior trial nor with the admissions set forth by the Commonwealth in its pre-trial pleadings on the conspiracy indictment.

The petitioners did not testify nor did they produce any defense witnesses at the prior trial.[5] The Commonwealth introduced uncontroverted testimony that the fire was indeed set. A state trooper testified that the building had a strong chemical odor immediately subsequent to the fire (A. 75a). A state

[5] Through cross-examination, the petitioners showed that they had been employed to perform construction work on the premises and that their presence in the building was lawful and within the scope of that employment.

police chemist testified that a flammable liquid, denatured alcohol, was found to be present in carpeting samples taken from the scene of the fire. Finally, in the opinion of a deputy chief and the chief of the Boston Fire Department, the fire was of incendiary origin (A. 76a, 85a).

Thus, for the Supreme Judicial Court to suggest that the jurors may have concluded that the fire was not set, clearly indicates not merely that its inquiry into petitioners' claims was not "set in a practical frame and viewed with an eye to all the circumstances of the proceedings," *Sealfon* v. *United States*, *supra*, quoted in *Ashe* v. *Swenson*, *supra* at 444, but that its opinion is based on a misreading of the record.[6]

The Supreme Judicial Court's only other rationale for concluding that the jury may have reached its decision rationally on some issue of ultimate fact other than that the petitioners were not in any way responsible for the fire, was that the jury may have concluded that there was no active participation by the petitioners with the person who set the fire. Again, the Supreme Judicial Court has misread the record.

The Commonwealth made no attempt at the prior trial to prove that an accomplice was present at the scene of the fire and the Commonwealth did not advance that theory to the jury during its closing argument (A. 117a). The Commonwealth's pre-trial pleadings disclose that it possesses no evidence to suggest the existence of any accomplices and that the Commonwealth cannot identify any co-conspirators other than the petitioners (A. 62a). The Commonwealth's most recent statement of the evidence it expects to introduce in support of the conspiracy indictment, given more than three and

[6] See Mayers & Yarbrough, Bis Vexari: New Trials and Successive Prosecutions, 74 Harv. L. Rev. 1, 39 (1960), wherein the authors state that "if a later court is permitted to state that the jury may have disbelieved substantial and uncontradicted evidence of the prosecution on a point the defendant did not contest, the possible multiplicity of prosecutions is staggering." *Ashe*, *supra* at 445 n.9.

one-half years following the return of that indictment, makes no reference to an accomplice (A. 96a). To the contrary, the Commonwealth intends to show that all of the other persons present at the scene of the fire did not set the fire (A. 85a). The Commonwealth does not now nor has it ever contended some person or persons other than the petitioners set the fire. Thus the jury could not possibly have based its verdict on the premise that the petitioners aided, counseled or procured someone else to set the fire.

Accordingly, the Supreme Judicial Court has failed to properly examine all of the evidence and pleadings and other relevant material in the prior proceeding. See *Ashe*, *supra* at 444. Its decision should therefore be reversed.

II. The Doctrine of Collateral Estoppel Bars the Petitioners' Prosecution on the Charge of Conspiracy to Commit Arson Because the Core of the Prosecutors' Case is the Same as That Presented in the Previous Trial on the Charges of Arson and Breaking and Entering with Intent to Commit Arson.

This Court has long held that the doctrine of collateral estoppel may totally bar a subsequent prosecution of an offense separate and distinct from an offense prosecuted at a prior trial. *Sealfon* v. *United States*, *supra*. In *Sealfon*, this Court held that the acquittal of the defendant on the charge of conspiracy to defraud the United States government barred any subsequent attempt by the prosecution to prove that the defendant committed the substantive offense due to its practical and pragmatic determination that "*the core of the prosecutor's case was in each case the same.*" *Id.* at 580 (emphasis added).

As Judge Friendly, in a Second Circuit opinion in *United States* v. *Kramer*, *supra*, stated:

> The Government is free, within the limits set by the Fifth Amendment . . . to charge an acquitted Defendant with other crimes claimed to arise from the same or related conduct; but it may not prove the new charge by asserting facts necessarily determined against it at the first trial, no matter how unreasonable the Government may consider that determination to be.

Id. at 916.

The Supreme Judicial Court's decision in this case is in direct contravention of *Sealfon*, *Ashe* and *Kramer*. The court has cleared the way for the Commonwealth to prosecute the conspiracy by proving that the petitioners, to the exclusion of all other persons in the building (A. 85a), were the only persons who could have set the fire. This very fact, the identity of the arsonists, was necessarily determined adversely to the Commonwealth at the first trial.

In *Harris* v. *Washington*, *supra*, this Court held that where "the ultimate issue of identity . . ." was decided by the jury in the first trial, that issue could not be repudiated in a subsequent trial "irrespective of whether the jury considered all relevant evidence and irrespective of the good faith of the state in bringing successive prosecutions." *Id.* at 56-57. Similarly, in the case at bar, the Commonwealth cannot attempt to prove a conspiracy to commit arson by requiring the jurors to infer that the petitioners set the fire.

In *United States* v. *Kramer*, *supra*, the Second Circuit found that the government's evidence in the second trial was substantially identical to that introduced at the first trial where the defendant was acquitted of the substantive offenses of burglary. The court reversed defendant's subsequent convictions for conspiracy to commit the very same burglaries and directed the entry of judgment of acquittal. The directed judgment of acquittal was required because the subsequent prosecution was based on evidence that "would necessarily tend to show

the defendant was a principal or aider or abetter to the charges charged in the first trial." *Id.* at 915. In accord, *United States* v. *Mock*, 604 F.2d 341 (5th Cir. 1979); *Wingate* v. *Wainwright*, 464 F.2d 209 (5th Cir. 1972); *United States* v. *Larkin*, 605 F.2d 1360 (5th Cir. 1979), *reheard*, 611 F.2d 585 (5th Cir. 1980); and *United States* v. *Keller*, 624 F.2d 1154 (3d Cir. 1980).

In *Turner* v. *Arkansas*, *supra*, this Court held that the jury's acquittal of the defendant on a charge of felony murder at the first trial precluded "the possibility of a constitutionally valid conviction for . . . robbery" at a subsequent trial. *Id.* at 369.[7] In *Turner*, the government stipulated that its evidence would be identical with that it introduced at the first trial. Similarly, the Commonwealth's trial memorandum and oral statement to the court below show that the Commonwealth intends to introduce substantially the same evidence at the second trial as was introduced at the first trial.

In the case at bar, it was conclusively established that the petitioners did not set the fire or aid, counsel and procure the burning of the building. The doctrine of collateral estoppel is applicable herein and necessarily precludes the Commonwealth from attempting to prove a conspiracy by relitigating the actions of petitioners on December 20, 1978 at 101-109 State Street. The Supreme Judicial Court's failure to properly review the case below under the *Sealfon* and *Ashe* guidelines was error.

III. The Commonwealth of Massachusetts is Collaterally Estopped from Relitigating Those Facts and Issues Which were Necessarily Determined Against it at the Petitioners' Prior Trial.

Inasmuch as the Commonwealth has conceded that it possesses no direct evidence of a conspiracy and that it cannot

[7] In *Turner*, as in the case at bar, the prosecution was statutorily prohibited from trying all pending charges in a single proceeding. See footnote 1, *supra*.

identify persons who acted in concert with the petitioners (A. 64a), the Commonwealth must necessarily seek to convince a jury that the petitioners were in some way responsible for the incendiary fire which occurred on December 20, 1978. The Commonwealth will thus seek to relitigate the issue of the identity of the person or persons who set that fire, an issue which has already been conclusively determined against the Commonwealth in the prior trial. This procedure would clearly violate the teachings of *Ashe*.

Absent a constitutional impediment arising from a prior acquittal on a substantive offense, the Commonwealth may properly attempt to prove an agreement to commit a crime by proving that the crime itself was committed or that acts were taken towards its commission. *Attorney General* v. *Tufts*, 239 Mass. 458 (1921). The Commonwealth's hope in this case would be that the jury will infer the existence of an agreement to commit arson from the commission of the underlying substantive offense of arson. This is a widely used and perfectly permissible trial tactic in the Commonwealth. See, e.g., *Commonwealth* v. *Shea*, 323 Mass. 406 (1948); *Commonwealth* v. *Binkiewicz*, 342 Mass. 740 (1961); *Commonwealth* v. *Meserve*, 154 Mass. 64 (1891).

The principal reason for the use of such inferential evidence is that the prosecution, due to the nature of the crime of conspiracy, rarely possesses direct evidence of the illegal agreement. Accordingly, the common purpose is often inferred from concerted action leading to a definite end, *Attorney General* v. *Tufts*, *supra*.

In the case at bar, however, the jury in the first trial determined that the petitioners did not commit the arson which is the stated objective of the alleged conspiracy. The Supreme Judicial Court concedes this point when it suggests that someone other than the petitioners actually set the fire (A. 9a). The Commonwealth has represented to the trial court that it cannot

identify any persons who acted in concert with the petitioners nor can it show any acts of the petitioners in furtherance of the conspiracy other than that the petitioners "did aid, counsel, procure and cause [the] building to burn" (A. 62a). Additional evidence enumerated by the Commonwealth in its trial memorandum (A. 82a), focuses on the identity of the petitioners as the persons who set the fire and their possible motives for doing so. The Commonwealth will also attempt to prove that all of the other occupants of the building on the evening of December 20, 1978 are innocent of setting the fire (A. 85a). The inevitable inference from all of the evidence which the Commonwealth has represented that it will introduce is that the petitioners set the fire.

To grant the Commonwealth an opportunity to relitigate these facts, thereby conceding that the previous adjudication was merely a dry-run, would be squarely contrary to the mandates of this Court set forth in *Sealfon* and *Ashe*.

The core of the Commonwealth's case in both trials will be the same; the Commonwealth will be re-trying the substantive offenses under the nominal rubric of a conspiracy indictment seeking to establish the existence of a conspiracy by proving the commission of the underlying substantive offense. This, the Commonwealth may not do without undermining the fundamental rights secured to the petitioners by the doctrine of collateral estoppel as embodied in the double jeopardy clause of the Fifth Amendment.

Conclusion.

For the reasons set forth herein, it is respectfully submitted that this petition for certiorari should be granted.

Respectfully submitted,

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Appendix to Petition for a Writ of Certiorari to the Supreme Judicial Court for the Commonwealth of Massachusetts.

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OTHER APPENDED MATERIALS

COMMONWEALTH *vs.* ALBERT B. BENSON & another.[1]

Suffolk. February 8, 1983. -- June 15, 1983.

Present: HENNESSEY, C.J., WILKINS, LIACOS, ABRAMS, & NOLAN, JJ.

Constitutional Law, Double jeopardy. *Collateral Estoppel. Due Process of Law*, Collateral estoppel. *Conspiracy. Burning of Property.*

Defendant's acquittal on indictments charging them with arson, and with breaking and entering a building with the intent to commit arson, did not preclude on the ground of collateral estoppel a subsequent trial of the defendants on an indictment charging them with conspiracy to commit arson. [ ]

The return of a general verdict of not guilty on indictments charging defendants with arson and breaking and entering a building with the intent to commit arson did not preclude on the ground of collateral estoppel the introduction of evidence, at a subsequent trial of an indictment charging the defendants with conspiracy to commit arson, to create inferences that the defendants set the fire and, therefore, must have participated in an unlawful agreement, inasmuch as the verdict of not guilty may have been rationally based on an issue of ultimate fact other than that the defendants were not in any way responsible for the fire. [ ]

At a trial of defendants on an indictment charging them with conspiracy to commit arson, the prosecution would not be precluded on the ground of collateral estoppel from introducing evidence of the arson by the fact that such evidence had been admitted at a previous trial at which the defendants had been acquitted on indictments charging them with arson and breaking and entering with the intent to commit arson involving the same property, where proof of the identity of the persons who set the fire was not necessary to conviction on the conspiracy charge, and where the prosecution had represented that it would offer no evidence to implicate the defendants in the substantive arson offenses. [ ]

INDICTMENT found and returned in the Superior Court Department on January 11, 1979.

[1] Viktor E. Benson.

The case was reported by *Lynch*, J., to the Appeals Court. The Supreme Judicial Court ordered direct review on its own initiative.

Murray P. Reiser (*Eric H. Karp* with him) for Viktor E. Benson.

John C. Martland for Albert B. Benson.

Martin E. Levin, Assistant Attorney General, for the Commonwealth.

LIACOS, J. On January 11, 1979, Albert and Viktor Benson were indicted for conspiracy to commit arson. On May 17, 1982, the defendants filed a motion in the Superior Court to dismiss the indictment. They alleged that, having been acquitted previoulsy on the substantive charges of arson and of breaking and entering in the nighttime with the intent to commit arson, the doctrine of collateral estoppel bars the prosecution of the defendants for the crime of conspiracy to commit arson. In the alternative, the defendants allege that the Commonwealth is precluded by the principles of collateral estoppel from relitigating all facts and issues necessarily determined in their favor at the prior trial. See *Ashe* v. *Swenson*, 397 U.S. 436 (1970); *Commonwealth* v. *Lopez*, Mass. Adv. Sh. (1981) 1071. A motion to reserve and report to the Appeals Court the defendants' motion to dismiss the indictment was filed and granted by a judge of the Superior Court. Mass. R. Crim. P. 34, 378 Mass. 905 (1979). We transferred the report here on our own motion.[2] The case has been continued for trial pending our decision.

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[2] The report is of the case, together with the following questions:

"(1) Whether, under the circumstances of this case, the doctrine of collateral estoppel, as embodied in the double jeopardy clause of the Fifth Amendment to the Constitution of the United States, bars the prosecution of the defendants for the crime of conspiracy to commit arson?

"(2) Whether, alternatively, that doctrine bars the relitigation of all facts and issues that were necessarily determined in the defendants' favor at their trial on the indictment charging the substantive crime of arson?

"(3) Given that the only evidence which the Commonwealth can and will adduce at the trial of the defendants on a conspiracy-to-commit-arson indictment is that evidence which the Commonwealth by memorandum

While the defendants correctly state the proposition that the principles of collateral estoppel are embodied in the Fifth Amendment guarantee against the double jeopardy, *Ashe* v. *Swenson*, *supra*, and are therefore enforceable against the Commonwealth through the Fourteenth Amendment, *Benton* v. *Maryland*, 395 U.S. 784 (1969), the defendants have failed to satisfy their burden of showing that collateral estoppel is applicable in these circumstances. *Commonwealth* v. *Lopez*, *supra*. We therefore conclude that the motion to dismiss the indictment should be denied.

We summarize the facts. On the evening of December 20, 1978, State police observed Albert and Viktor Benson entering an office building in Boston. Shortly after they left the building, it burst into flames. The Bensons were arrested and indicted on identical charges of arson, breaking and entering in the nighttime with the intent to commit arson, and conspiracy to commit arson. The Commonwealth first prosecuted the defendants for the substantive crimes.[3] The jury returned general verdicts acquitting the defendants of the substantive crimes of arson, and breaking and entering with the intent to commit arson.

The Commonwealth subsequently undertook to renew proceedings on the conspiracy indictment. In October, 1979, the defendants filed their first motion to dismiss the conspiracy indictment based on the Commonwealth's acknowledgment that (1) it had no direct evidence of the ex-

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asserted it will produce, and nothing more, whether such a trial of the defendants, acquitted on substantive arson indictments involving the same property, is now barred by double jeopardy or collateral estoppel principles?"

[3] At the time, the Commonwealth was statutorily prohibited from trying the substantive crimes at the same time it tried the defendants for conspiracy to commit the same substantive offenses. G. L. c. 278, § 2A, repealed by St. 1979, c. 344, § 43. The prohibition found in G. L. c. 278, § 2A, is now found in Mass. R. Crim. P. 9(e), 378 Mass. 859 (1979) (providing, however, that a defendant may move for joinder of the charges).

istence of conspiracy, (2) it had no evidence that a conspiracy had occurred on any date other than that of the fire, and (3) it could not identify any alleged coconspirators other than the defendants. A Superior Court judge denied the relief sought by the defendants.

Through later pleadings, filed on March 14, 1980, the Commonwealth indicated that it intended to introduce evidence of three other fires and the alleged involvement of the defendants therein. The defendants, in response, successfully moved for an order barring the Commonwealth from introducing such evidence. The defendants also filed a motion in limine seeking to preclude the Commonwealth from relitigating, at the conspiracy trial, all facts and issues necessarily determined against it by the prior acquittal of the defendants on the substantive charges. A renewed motion to dismiss was filed also on the same principles of collateral estoppel. The trial memorandum filed by the Commonwealth at the request of the court summarized the evidence the Commonwealth intends to introduce at the conspiracy trial.[4] Both motions were denied. Thereafter the defendants filed an application with a single justice of this court for leave to file an interlocutory appeal in the Supreme Judicial Court. After a hearing, the application was denied without prejudice, allowing the defendants to renew their contentions during the course of the trial.

The defendants then filed a petition for a writ of habeas corpus, pursuant to 28 U.S.C. §§ 2241 and 2254 (1976), and a complaint for declaratory and injunctive relief, pursuant to 42 U.S.C. § 1983 (1976 & Supp. V 1981), in the United States District Court for the District of Massachusetts. Both

[4]The affidavit filed by the defendants in support of the motion in limine was treated by the motion judge as a more precise recitation of the proposed evidence of the Commonwealth. The defendants maintain that the Commonwealth's trial memorandum, together with the Commonwealth's March 14 pleading, which a judge held contained inadmissible evidence, are the only documents of record suggesting the nature of the evidence to be introduced by the Commonwealth if it is allowed to proceed with the conspiracy trial.

remedies sought were grounded on the claim of collateral estoppel. Concluding that the Bensons had exhausted their State remedies, the United States District Court for the District of Massachusetts nevertheless denied the petition for habeas corpus and complaint for injunctive relief, but declared that "the Commonwealth will be foreclosed from claiming or arguing that [the Bensons] set the fire in the building or that they did aid, counsel or procure the burning of the building. However, that alone would not be enough to bar prosecution of the conspiracy indictment . . . ." Amendment of memorandum of decision dated February 26, 1981 (March 6, 1981), for *Benson* v. *Superior Court Dep't of the Trial Court*, 507 F. Supp. 975, 978 (D. Mass. 1981) (hereinafter cited as *Benson I*). On appeal by the defendants of the denial of the writ of habeas corpus, the United States Court of Appeals for the First Circuit vacated in part and affirmed in part the District Court judge's ruling. *Benson* v. *Superior Court Dep't of the Trial Court*, 663 F.2d 335, 359 (1st Cir. 1981) (hereinafter cited as *Benson II*). Affirming the denial of the request for injunctive relief and the writ of habeas corpus, the First Circuit Court of Appeals vacated that part of the District Court judge's decision which foreclosed the Commonwealth from offering specific evidence at the trial on the conspiracy charge, holding that the issue was not ripe because the court did not know how the State would marshal its evidence.[5] *Id.* at 360-361.

The defendants then filed a petition for relief by the Supreme Judicial Court pursuant to its supervisory power. G. L. c. 211, § 3. After a hearing, a single justice continued the action, pending the defendants' filing a motion in the Superior Court to reserve and report a motion to dismiss. On May 17, 1982, the defendants filed with the Superior Court the motion to dismiss now before us. It is this motion which is here on the reservation and report.

[5] The denial of the writ of habeas corpus was affirmed because of the view of the Court of Appeals that the defendants had not exhausted their State remedies.

The parties argue a variety of legal issues. We consider only those dispositive of the report. Collateral estoppel is an established rule of criminal law. See *Ashe* v. *Swenson*, 397 U.S. 436 (1970); *Commonwealth* v. *Lopez*, Mass. Adv. Sh. (1981) 1071. Collateral estoppel "means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." *Ashe* v. *Swenson*, *supra* at 443. See *Commonwealth* v. *Scala*, 380 Mass. 500, 503 (1980). The doctrine of collateral estoppel may work in two ways. First, it may bar totally a subsequent prosecution if one of the issues necessarily decided at the first trial is an essential element of the alleged crime in the second trial. Second, even if a prosecutor may proceed to a second trial, the doctrine may bar the introduction of certain facts determined in the defendant's favor at the first trial. See *United States* v. *Lee*, 622 F.2d 787, 790 (5th Cir. 1980). The doctrine of collateral estoppel will preclude either the subsequent prosecution or the introduction or argument of certain facts, only if the jury could not have based their verdict rationally on an issue other than the one the defendant seeks to foreclose. See *Ashe* v. *Swenson*, *supra* at 444. Whenever the doctrine of collateral estoppel is raised by a defendant, the task of the court is to decide exactly what issues were, or should have been, determined at the first trial.[6] See *Sealfon* v. *United States*, 332 U.S. 575, 578-579 (1948). Such inquiry must be conducted in a realistic and practical manner by reviewing the proceedings as a whole. See *Ashe* v. *Swenson*, *supra*.

We first consider whether the acquittal of the defendants on the substantive charges of arson, and breaking and enter-

[6] See *Commonwealth* v. *Lopez*, Mass. Adv. Sh. (1981) 1071, 1073-1074 (court must look for concurrence of [1] a common factual issue, [2] prior determination of that issue, and [3] determination of that issue in favor of the party raising collateral estoppel). In addition, the doctrine of collateral estoppel only applies in a criminal case where there is mutuality of the parties. See *Commonwealth* v. *Cerveny*, 387 Mass. 280, 284-285 (1982). There is no question that the defendants have satisfied the last requirement.

ing with the intent to commit arson, bars completely the prosecution for a conspiracy to commit arson. We conclude that the subsequent prosecution for conspiracy is not barred.

It long has been settled that "[a] 'substantive offence and a conspiracy to commit that offence' each constitute a 'distinct offence and each may be separately punished.'" *Commonwealth* v. *French*, 357 Mass. 356, 393 (1970), judgments vacated as to death penalty sub nom. *Limone* v. *Massachusetts*, 408 U.S. 936 (1972), quoting *Commonwealth* v. *Stasiun*, 349 Mass. 38, 48 (1965). See *Commonwealth* v. *Gallarelli*, 372 Mass. 573, 576-577 (1977); *Commonwealth* v. *Shea*, 323 Mass. 406, 411 (1948); *Sealfon* v. *United States*, *supra* at 578. The judge at the first trial properly instructed the jury as to the elements of the arson. He stated: "Whoever willfully and maliciously sets fire to, burns or causes to be burned or whoever aids, causes or procures the burning of a building, whether the same is the property of his or others, whether occupied, unoccupied or vacant, shall be guilty of . . . arson." See G. L. c. 266, § 2; *Commonwealth* v. *Niziolek*, 380 Mass. 513, 526 (1980). The elements of conspiracy are "a combination of two or more persons, by some concerted action, to accomplish some criminal or unlawful purpose . . . . [T]he unlawful agreement constitutes the gist of the offence, and therefore . . . it is not necessary to charge the execution of the unlawful agreement." *Commonwealth* v. *Dyer*, 243 Mass. 472, 483 (1922), quoting *Commonwealth* v. *Hunt*, 4 Met. 111, 123-125 (1842). Contrary to the contentions of the defendants, the language of the arson statute, "causes," "aids," "counsels," or "procures," does not incorporate an unlawful agreement. Such wording relates only to an element of joint venture. See *Commonwealth* v. *Stasiun*, *supra* at 48-49; *Benson II*, *supra* at 360 n.1. Criminal culpability for a substantive offense on the theory of a joint venture is based on elements distinct from those involved in proof of a conspiracy. The unlawful agreement to commit arson, which the Commonwealth is required to prove beyond a reason-

able doubt in the instant case, was not an element required to be proved in the first trial. Conspiracy to commit a substantive offense constitutes an offense distinct from the substantive offense and may be separately punished. *Commonwealth* v. *French*, *supra*. Subsequent prosecution on charges of conspiracy after acquittal of the substantive offense does not implicate the doctrine of collateral estoppel. Cf. *Commonwealth* v. *Gallarelli*, *supra*.

We next consider whether the introduction of evidence to create inferences that the defendants set the fire, or aided, caused, counseled, or procured the burning of the building is barred because such evidence relates to facts which were necessarily determined in the Bensons' favor by the general verdict of not guilty of the substantive charges of arson, but which the Commonwealth would have to prove for a conspiracy conviction. We conclude that there is no bar to such evidence.[7]

Although the Commonwealth has admitted that it has no direct evidence of a conspiracy, its trial memorandum indicates that it intends to prove the charge by circumstantial evidence. Such a method of proof is generally consistent with accepted practice. See *Attorney Gen.* v. *Tufts*, 239 Mass. 458, 494 (1921). The defendants contend that the Commonwealth does not have sufficient evidence to prove an illegal agreement if it cannot relitigate evidence creating the inference that the defendants set the fire and therefore must have participated in an unlawful agreement. The defendants contend that the verdict acquitting them necessarily determined that the defendants were not responsible in any way for burning the building. They cite *United States* v. *Kramer*, 289 F.2d 909 (2d Cir. 1961), and claim that the Commonwealth "may not prove the new charge by assert-

[7] On this point, we note that both the District Court judge and the Court of Appeals reached the same conclusion. See *Benson* v. *Superior Court Dep't of the Trial Court*, 507 F. Supp. 975, 978-979 (D. Mass. 1981) (*Benson I*); *Benson* v. *Superior Court Dep't of the Trial Court*, 663 F.2d 355, 360-361 (1st Cir. 1981) (*Benson II*).

ing facts necessarily determined against it on the first trial, no matter how unreasonable the Government may consider that determination to be." *Id.* at 916.

The defendants, however, have failed to recognize the "difficulties often encountered with respect to a general verdict of 'not guilty.'"[8] *Id.* at 913. The defendants' reliance on *United States* v. *Kramer*, *supra*, is misplaced. "*Kramer* was the rare case where it was possible to determine with certainty what the jury in the earlier prosecution had decided." *United States* v. *Cioffi*, 487 F.2d 492, 498 (2d Cir. 1973). "A finding of not guilty at a criminal trial can result from any number of factors having nothing to do with the defendant's actual guilt." *Commonwealth* v. *Cerveny*, 387 Mass. 280, 285 (1982). In accordance with the trial judge's instructions, the jury may have acquitted the Bensons because they concluded that the fire was not set or because they concluded that there was no active participation by the defendants with the person who set the fire.[9] Since the jury may have reached its decision rationally on some issue of ultimate fact other than that the defendants were not in any way responsible for the fire, the defendants have not met their burden of proving that this fact was necessarily determined by virtue of the general verdict of acquittal. "It is not significant that, in proving the conspiracy, the Commonwealth also presented evidence of overt acts by each of the defendants which tended to prove the substantive offense." *Commonwealth* v. *Gallarelli*, *supra* at 577.

The principles of collateral estoppel are inapplicable to the evidentiary facts of the prior trial because of the tenuous and speculative relationship between the result in the prior

[8] One commentator has described the examination of the previous prosecution to determine the issue on which a rational jury based its verdict as the "doctrine of 'reasonable speculation.'" Note, Twice in Jeopardy, 75 Yale L.J. 267, 284-285 (1965).

[9] We note that the Commonwealth represents in its brief that it will not seek to prove that the defendants set the fire and will ask that the jury be told of the acquittal of the defendants on the substantive charges. Such a charge may be appropriate, if the defendants assent.

proceeding and the evidence proposed to be presented in the subsequent prosecution.

The answers to the questions reported are: (1) "No"; (2) "No"; (3) "No." The case is to stand for trial.

COMMONWEALTH OF MASSACHUSETTS

Suffolk, ss. Superior Court
No. 024292

COMMONWEALTH	)	
	)	
vs.	)	RULINGS AND DECISION ON
	)	MOTION TO DISMISS
VIKTOR E. BENSON	)	
ALBERT B. BENSON	)	

This motion to dismiss a conspiracy indictment against Viktor E. Benson and Albert B. Benson came on for hearing before the court. All parties argued and filed briefs.

Since the same facts and arguments apply to each of the defendants, the court is only writing one memorandum which will apply to both defendants. For the purposes of this memorandum, Viktor E. Benson will be referred to as "Viktor" and Albert B. Benson will be referred to as "Albert."

In Indictment No. 024294, Viktor was charged, in material part, that: "Viktor E. Benson on December 20, 1978 did wilfully and maliciously cause to be burned, and did aid, counsel and procure the burning of the building situated at 101-109 State Street, Boston. . . ."

In Indictment No. 624293, Viktor was charged, in material part, that: "Viktor E. Benson on December 20, 1978 did break and enter in the night time the building of Thomas Groom & Co., Incorporated situated at 101-109 State Street in Boston, with the intent to commit a felony: to wit arson."

In Indictment 024292, Viktor and Albert were charged, in material part, that: "Viktor E. Benson, Albert B. Benson, on December 20, 1978, and on divers other dates, did conspire together to wilfully and maliciously cause a building to be burned and did conspire together to aid, counsel and procure

the burning of a building situated at 101-109 State Street, Boston. . . ."

Albert was similarly charged. Indictment 024292 alleging conspiracy with Viktor, see above paragraph. Indictment 024296 reads like 024294 and Indictment 024295 reads like 024293, only charging Albert instead of Viktor.

On September 11, 1979, a trial was held in Suffolk Superior Court before a judge and a jury on indictments 024293 and 024294 against Viktor and indictments 024295 and 024296 against Albert. The cases were tried together. On September 18, 1979 the jury returned verdicts of not guilty on indictments 024293 and 024294 against Viktor and 024295 and 024296 against Albert.

Before the court is a motion to dismiss Indictment 024292, a conspiracy indictment, against both Albert and Viktor. It was agreed that this indictment was not tried with indictments 024294, 024296, 024293 and 024295. It was further agreed that at all times pertinent to this case, G.L. c. 278, § 2A was in effect which prohibited the trial of indictments for substantive crimes with indictments for conspiracy to commit those same substantive crimes.

Certain exhibits were introduced including certain pre-trial motions and transcripts for the trial of indictments 024294, 024296, 024293 and 024295. The court has reviewed the transcripts and the exhibits. The court has also reviewed the briefs and cases submitted by all of the parties.

It is further agreed that the Commonwealth only moved for trial of indictments against both defendants on the substantive counts of arson (G.L. c. 266, § 10) and breaking and entering (G.L. c. 266, § 16), and pursuant to G.L. c. 278, § 2A the Commonwealth did not move for trial on the conspiracy indictment No. 024292.

The defendants argue that since the defendants were found not guilty of the substantive crimes of arson and breaking and

entering, and that since substantially the same evidence offered at the substantive trial will be offered at the conspiracy trial, the offenses are basically the same in nature and the conspiracy indictment should be dismissed since the defendants have already been placed in jeopardy for the conspiracy indictment. The defendants further argue that the Commonwealth should be collaterally estopped from relitigating identical issues in the conspiracy indictment.

The Commonwealth argues that the defendants may be prosecuted both for conspiracy to commit arson and for the substantive crime of arson; that such prosecutions are not barred on the double jeopardy grounds; that the doctrine of collateral estoppel is not applicable to the facts in this case; and that the motion to dismiss the indictment at this posture should be denied.

It is clearly the law in this Commonwealth that the defendants may be prosecuted both for the conspiracy to commit arson and for the substantive crime of arson, and that such prosecutions are not barred on double jeopardy grounds. *Comm.* v. *French*, 357 Mass. 356, 393 (1970); *Comm.* v. *Gallarelli*, 372 Mass. 573, 576-577 (1977); *Comm.* v. *Shea*, 323 Mass. 406, 411 (1948). In *Gallarelli*, the Supreme Judicial Court referred to the long-standing rule in Massachusetts which states the following:

> A single act may be an offense against two statutes; and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other. *Morey* v. *Commonwealth*, 108 Mass. 433, 434 (1871).

The defendants argue that the judge in the substantive trials charged the jury on conspiracy and therefore the conspiracy

indictment prosecution should be barred. Without passing on the legal effect of the argument, in reviewing the part of the charge referred to by the defendants, I find and rule that the judge was charging on a joint criminal enterprise and not conspiracy.

A trial based on the joint criminal enterprise theory is distinguishable from a trial on the conspiracy theory. It is essential to a conviction on a common enterprise theory that the defendants ". . . were jointly engaged in the commission of a [crime] and that the defendant(s) associated [themselves] with that venture and participated to some extent in the offense." *Comm.* v. *Stasiun*, 349 Mass. 38, 49. *Comm.* v. *Benders*, 361 Mass. 704, 708 (1972).

It is necessary for the Commonwealth in a common enterprise case to produce facts that the defendants participated in the offense to some extent. *Comm.* v. *Madeiros*, 354 Mass. 193, 198 (1968). The Commonwealth has the burden of proving each element of the respective offenses and showing the participation of the defendants. The crime of conspiracy is generally preliminary to the substantive offense; it is complete with an agreement between two or more persons to commit a crime. *Comm.* v. *Dyer*, 243 Mass. 472, 483 (1922). The distinction lies in the Commonwealth's burden of proof. In a conspiracy prosecution the Commonwealth must prove the fact that there was an unlawful agreement. In a common enterprise prosecution the Commonwealth must prove the elements of the crime and show that the defendants participated in the commission of the crime. In the instant case the proof of an unlawful agreement is distinct from the proof of wilfully setting a fire.

In the trial of the substantive offenses the Commonwealth had the burden of proving that the defendants "did . . . cause to be burned, and did aid, counsel and procure the burning of a building." To prove arson, the Commonwealth had to prove

the defendants set fire or were accessories before the fact of the fire, which is no part of the necessary proof as to the conspiracy indictment.

The Commonwealth could satisfy its burden on the substantive offense by showing one of the following: (a) that the defendants set the fire, (b) that the defendants poured gasoline for someone else to set the fire, (c) that the defendants advised and aided where or how to set the fire, (d) that the defendants paid others to set the fire. While these facts would be admissible to support an agreement to commit a crime, they may not, by themselves, satisfy the Commonwealth's burden on a conspiracy indictment. The facts (a-d) above are not an illegal agreement, but facts in carrying out the agreement.

In the conspiracy indictment in the instant case, the Commonwealth is required to prove an unlawful agreement, *Comm.* v. *Hunt*, 45 Mass. 111, 125 (1842), which is not required in the substantive arson case.

As to the double jeopardy claim, the court distinguishes the cases cited by the defendant. The facts in *North Carolina* v. *Pearce*, 395 U.S. 711 (1969) and *Green* v. *U.S.*, 355 U.S. 184, 187-188 (1957) are not applicable to the case before the court. The court understands that *Benton* v. *Maryland*, 395 U.S. 784 (1969) holds that the doctrine of double jeopardy is mandated by the Fifth Amendment of the Constitution of the United States and made applicable to the individual states through the Fourteenth Amendment. However, the court rules, for reasons stated before in this memorandum, that the doctrine of double jeopardy does not apply to the instant case.

G.L. c. 278, § 2A specifically states: "An indictment for conspiracy to commit a substantive offense shall not be tried simultaneously with an indictment for the commission of said substantive offense." (1968) To hold that an acquittal of the substantive crime prevents the trial of a conspiracy indictment would not make sense in light of this statute. If the acquittal

or conviction of the substantive crime would bar a trial for the conspiracy indictment, the legislature would have so indicated. Here the legislature separated the trials of substantive and conspiracy indictments without indicating that the acquittal or conviction of the substantive crime would bar a later trial of the conspiracy indictment.

The Commonwealth is not barred from prosecuting the case on grounds of collateral estoppel. In addressing this issue in *Comm.* v. *Shagoury*, 1978 Mass.App.Ct.Ad.Sh. 927, 931, the Appeals Court stated the following:

> The doctrine of collateral estoppel operates to insure that due process is not violated in consecutive criminal proceedings against the same defendant by foreclosing the relitigation of those issues in the defendant's second trial which were determined by the verdict in his earlier trial, even though the offenses charged in the two trials may not be the same. *Sealfon* v. *U.S.*, 332 U.S. 575, 578 (1948). *Harris* v. *Washington*, 404 U.S. 55, 56 (1971). Where the prior proceeding against the defendant results in a general verdict of acquittal, the court must examine the evidence, pleadings and other relevant material from the prior proceedings to determine whether a rational jury could have grounded their verdict upon some issue other than that which the defendant seeks to foreclose from consideration in the later proceeding. *Ashe* v. *Swenson*, 397 U.S. 436, 444 (1970). *Ottomano* v. *U.S.*, 468 F.(2d) 269, 272 (1st Cir. 1972) *cert. denied* 409 U.S. 1128 (1973). The defendant has the burden of establishing that the issue of fact which he seeks to foreclose from consideration in the subsequent proceeding was necessarily determined in his favor by the verdict in the prior proceeding. *United States* v. *Tramunti*, 500 F.(2d) 1334, 1346 (2d Cir.) *cert. denied* 419 U.S. 1079 (1974). *United States* v. *King*, 563 F(2d) 559, 561 (2d Cir. 1977)."

In applying the doctrine of collateral estoppel to the facts in the *Shagoury* case, *supra*, the court held that "the Commonwealth was not foreclosed from litigating in the present trial the issue of the defendant's involvement in the September 20 theft." The court held that the doctrine of collateral estoppel did not apply.

On the substantive offenses in the case before the court, the jury had to be satisfied beyond a reasonable doubt that the defendant or defendants either set the fire on December 20, 1978 or caused someone to set the fire. Accordingly, there were several rational bases upon which the Suffolk County Jury could have acquitted the defendant or defendants on the charge of setting the fire without having determined that the defendants had not conspired in setting the fire. The jury, for example, while believing the testimony concerning the presence of the defendant or defendants in the building on the night of the fire, could have found that the fire was not set, or that the defendant or defendants were not placed in the area of the fire, or that other people had an equal opportunity to set the fire, or that there was no evidence that the defendant or defendants acted in concert with whomever set the fire. The defendants were charged as principals in the commission of a felony, and the jury had the right to refuse to find that the defendants were present, aiding and abetting those who set the fire.

In *Comm.* v. *Shea*, 323 Mass. 406, 411 (1948), the Supreme Judicial Court said:

> The acquittal of the defendant on the breaking and entering and larceny indictment did not affect the prosecution for a conspiracy to steal. The offenses were distinct from and independent of each other. A conviction on either indictment would not bar a conviction on the other, and this would be true even if one indictment had charged the

> defendants with committing a crime and the second had charged them with a conspiracy to commit the same offense. *Commonwealth* v. *Walker*, 108 Mass. 309 [other citations ommitted]."

The fact that this case was before present G.L. c. 278, § 2A does not make the case inapplicable to the present case.

The fact that the substantive offense and conspiracy were based on the same incident is not a bar to two separate trials. *Comm.* v. *Gallarelli*, *supra*. The fact that the same evidence is used to support the separate offenses is not a bar to a second trial. *Morey* v. *Comm.*, 108 Mass. 433, 434.

In a conspiracy prosecution, the Commonwealth's usual mode of proof is by way of circumstantial evidence. *Comm.* v. *Riches*, 219 Mass. 430, 438 (1914). The Commonwealth is allowed to show a common scheme which tended to show a background that the conduct was part of a general purpose and cause of operation. *Comm.* v. *Farmer*, 218 Mass. 507, 512, 513.

In the trial on the substantive charges, the defendants filed a motion in lemine requesting the trial judge to restrict the Commonwealth from offering evidence of "other fires with which Albert Benson and/or Viktor Benson may have been associated" with themselves or with Harold Brown. This motion was allowed by the trial judge. In the conspiracy trial the Commonwealth may be allowed to offer evidence of other fires as long as it is relevant to the crime being charged. *Comm.* v. *Egan*, 357 Mass. 585, 589 (1970); *Comm.* v. *Borans*, 1979 Mass.Ad.Sh. 2349, 2389.

The defendants cite to *Ashe* v. *Swenson*, 397 U.S. 436, 443-444 (1970) to support its claim of collateral estoppel. The court distinguishes this case from the instant case on the facts. The court also points out that that case was reversed after trial, not on a motion to dismiss.

At this posture what evidence will be presented by the Commonwealth in the conspiracy trial is not known. While the defendants say it will be the same evidence that was heard in the substantive trial, the Commonwealth does not agree that that is so. The Commonwealth submits that the defendants' association with Hamilton Realty and their collective history of incendiary and suspicious fires would be material and relevant in the trial of the conspiracy charge. No cases have been presented by the defendants holding that at this posture a motion to dismiss should be allowed.

The court does not agree that a conspiracy charge is a lesser included offense of the substantive crime as argued by the defendants. *Costarelli* v. *Comm.*, 1978 Mass.Ad.Sh. 734, cited by the defendants does not state this, and the case does not address the question before the court at this time.

Kuklis v. *Comm.*, 361 Mass. 302, and *Comm.* v. *Mahoney*, 331 Mass. 510, do not address the issue before the court in the instant case.

In their brief the defendants cite *Comm.* v. *Gallarelli*, 372 Mass. 573, as recognizing that individuals may be prosecuted both for conspiracy to commit an illegal act and for the illegal act. However, the defendants, recognizing this, argue that the Supreme Judicial Court clearly left room for discretion. While the Court in *Gallarelli*, at page 927, said:

> We do not say there may never be a case where prosecutorial discretion may be exercised in such a way under the same evidence 'rule' as to amount to such harassment in multiple and successive prosecutions as to require relief for the defendant. . . .",

the court does not find that the instant case is such a case.

The defendants argue that the "same transaction" test should be constitutionally required as supportive of the double

jeopardy principle since the "same evidence" rule permits multiple prosecutions where a single transaction is divisible into discrete crimes. The court does not agree that the same transactions rule is the law of the Commonwealth or that it should be constitutionally required.

The court has examined the cases cited by the defendants but does not find that they address the issue before the court at this posture, a motion to dismiss.

For the reasons stated, the court respectfully denies the motion to dismiss.

/s/ _____
George J. Hayer
Justice of the Superior Court

Entered:

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS. SUPERIOR COURT
CRIMINAL NUMBER
024292

COMMONWEALTH OF MASSACHUSETTS

VS.

VIKTOR BENSON and ALBERT BENSON

Before: O'NEIL, J.

Suffolk Superior Court
Boston, Massachusetts
Tuesday, April 15, 1980

APPEARANCES:

JOHN BONISTALLI, ESQUIRE, Assistant Attorney General, Attorney for the Commonwealth
MURRAY REISER, ESQUIRE, Attorney for Viktor Benson
JORDAN L. RING, ESQUIRE, Attorney for Albert Benson
JOHN MARTLAND, ESQUIRE, Attorney for Albert Benson

Susan Blodgett
Official Court Reporter
MASSACHUSETTS SUPERIOR COURT

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Witnesses (None)

THE COURT: Good morning.

MR. BONISTALLI: Good morning.

MR. RING: Good morning.

MR. REISER: Good morning.

MR. BONISTALLI: Your Honor, has the Court decided whether to go forward with Trooper Flaherty or Mr. Curran.

THE COURT: I am going to talk with you gentlemen in just about thirty seconds on that, and I'm certain that Trooper Flaherty will take the stand this morning unless further examination is waived. I just want to check with you a little bit as to the time schedule.

MR. RING: I am having difficulty hearing your Honor.

THE COURT: Well, you won't now. Can you hear me now?

MR. RING: Fine, Judge.

THE COURT: And on the next time schedule. Let me tell you an order that I have drafted here and which will be formalized substantially the same type of wording. This may affect in some way your presentation of evidence in this case. The Commonwealth is precluded from preventing evidence in its case in chief relative to incident arrangements and activities involving the properties in Bourne, Brockton, and Brookline; however, this order is not to be construed as precluding the testimony relative to one or more of these properties and the relationship of one or both of the defendants to the same for the purpose of impeachment of testimony of any witness that is called to testify in this case.

In the light of this order the Assistant Attorney General will not refer to such properties or matters relative thereto in the

Commonwealth's opening. In addition, in the event the Assistant Attorney General intends to present such evidence through examination or cross-examination for purposes of impeachment, the same will be called to the attention of the Court out of the hearing of the jury first.

Now, as I said to you before, an absolute precluding order I don't think is appropriate in many cases at all because -- why don't you sit down, let me finish, Mr. Ring.

MR. RING: Okay.

THE COURT: Because although evidence like that might not be probative and might be prejudicial or overwhelmingly prejudicial in the manner of proving the essential elements set forth in the indictment, that material like all other material might be important in the cross-examination of the witness, and I don't intend to restrict its use along those lines. However, it will not come in any form as a surprise to counsel or to the Court because if the situation is developed to a point where I think justice requires the Attorney General to use that information in some modified form or some such thing as that, we will have a chance to talk about that at the bench.

Now, Mr. Ring, you want to say something?

MR. RING: Yes. Your Honor, said, and I made some quick notes, in this case you can't use it except to impeach a witness called in this case. Your Honor meant by the defendant or by the Commonwealth?

THE COURT: If the Commonwealth, and I don't know what witnesses the Commonwealth is going to call, if the Commonwealth calls a witness who is hostile or reluctant and made some statements that the Commonwealth doesn't expect, the Commonwealth has a right to impeach that witness within the rules of evidence as it does any other witness. So that if the Commonwealth calls a witness and it is necessary or seems appropriate to test his testimony by some statement, then I'm not going to prevent the Commonwealth from doing

it; however, there is the built-in safeguard here, Mr. Ring, that before that is done it has to be reviewed and subject to an order of the Court up here.

CERTIFICATE

I, Susan Blodgett, Official Court Reporter, Suffolk Superior Court, do hereby certify that the foregoing pages are a true and accurate transcription of the proceedings in the matter of Commonwealth of Massachusetts vs. Viktor Benson and Albert Benson, taken at Suffolk Superior Court before O'NEIL, J., on Tuesday, April 15, 1980.

/s/ _____

Susan Blodgett
Official Court Reporter

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. SUPERIOR COURT
CRIMINAL NO. 0242

COMMONWEALTH	)
	)
vs.	) MEMORANDUM RE MOTION
	) IN LIMINE -I and
ALBERT B. BENSON	) IN MOTION TO DISMISS IV
VIKTOR E. BENSON	)

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Introduction

The defendants Benson stand before this court for trial on indictment numbered 024292 alleging that they, on December 20, 1978, and on divers other dates, did conspire together to aid, counsel and procure the burning of a building situated at 101-109 State Street, Boston in the County of Suffolk. On September 18, 1979 a Suffolk County jury returned verdicts of not guilty on indictments 024294 and 024296 which similarly stated that each defendant did willfully and maliciously cause to be burned and did aid, counsel and procure the burning of the same building. The same jury returned verdicts of not guilty on companion indictments of breaking and entering with intent to commit arson. Motions have been filed on behalf of both defendants grounded on the principle of collateral estoppel as enunciated in *Ashe* v. *Swenson*, 397, U.S. 436.

This court has before it for consideration two motions which are closely related insofar as the issues that are raised. The first motion treated in this memorandum is entitled "Motion in

Limine -I". By the allowance of this motion the defendants seek to preclude the introduction into evidence at the trial evidence that was determined against the criminals at the trial of the substantive offenses. The second motion is entitled "Motion to Dismiss IV" seeking the dismissal of the conspiracy indictments against both defendants on the basis of collateral estoppel.[1] The Commonwealth has filed a Trial Memorandum docketed on May 14, 1980 in the papers filed in this case. Attorney Jordan L. Ring, counsel of record for Albert B. Benson has filed an affidavit in support of Motion in Limine -I. With the agreement of the Commonwealth and both defendants the court has treated the Commonwealth's Trial Memorandum as a summary of the nature of the testimony which will be referred to in the Commonwealth's opening remarks to the jury as being the proposed evidence at the trial. Insofar as the affidavit of Mr. Ring is considered to the degree that it is consistent with the Trial Memorandum, it is treated as a more precise recitation of the testimony of the Commonwealth's witnesses. The court considers and acts on both motions at this time by specific request of all counsel by considering the Trial Memorandum and affidavit as above treated as an offer of proof in the matter of the motion in Limine I and representation by the Commonwealth as to the evidence it expects to present to the jury.

Treated in this fashion I deny both motions but without prejudice to the defendants' right to make similar motions to dismiss at the conclusion of the Commonwealth's opening in the event the opening varies from the contents of the Trial Memorandum and without prejudice to the defendants' readdressing the issues raised in the motion in Limine I for consideration in the light of the testimony elicited at the actual trial.

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[1] The nature of the motions is synopsized in this Memorandum and reference is made to the motions themselves.

The motion in Limine I requested a general order of preclusion from the "relitigation of issues" which were determined by the earlier verdict.

The record of the earlier trial was made available to the court for examination. Particular attention was paid to the opening and closing statements and to the jury instructions. The opening and closing statements concentrated on the identity of the person or persons causing the fire rather than on the issue as to whether the fire was of incendiary origin. No evidence was presented by the defendants. The question of reasonable doubt was emphasized in arguments by defendants counsel. The instructions made clear the responsibility of the Commonwealth to prove beyond a reasonable doubt *all* the essential elements of the offenses. A reasonable doubt in the mind of the jury as to *any one* of the essential elements of the offense could have resulted in the not guilty verdict. The essential elements of the offenses set forth in indictment No. 024292 are not entirely the same. The basis of the jury's determination of not guilty is therefore speculative and the issues determined by the 1979 verdict are therefore unclear. Compare *U.S.* v. *Kramer*, 289 F.2d 909 (2d Cir. 1961). No double jeopardy is presented here in the proposed trial of the companion conspiracy indictment. *Commonwealth* v. *Scala*, Mass. Adv. Sh. 1980.

/s/ _____
William C. O'Neil, Jr.
Justice of the Superior Court

Dated: June 23, 1980

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

SUPREME JUDICIAL COURT
FOR SUFFOLK COUNTY
No. 80-334 CIVIL

COMMONWEALTH OF MASSACHUSETTS

vs.

ALBERT B. BENSON
VIKTOR E. BENSON

ORDER

This matter came before the Court on the defendants' Application for leave to take interlocutory appeal. There was argument by counsel for the defendant and the assistant attorney general.

Upon consideration thereof, it is ORDERED that the application pursuant to Mass. R. Crim. P. 15 (b) (2) be, and the same hereby is denied, without prejudice to the renewal of the defendants' contentions in the course of the trial proceedings as the situation may then appear.

By the Court, (Kaplan, J.)
/s/_____
Jean M. Kennett
Assistant Clerk

Entered: October 3, 1980

A TRUE COPY:
ATTEST: /s/_____
Joseph A. Legotti
ASSISTANT CLERK
OCTOBER 6, 1980

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

SUPREME JUDICIAL COURT
FOR SUFFOLK COUNTY
No. 80-334 CIVIL

COMMONWEALTH OF MASSACHUSETTS

vs.

ALBERT B. BENSON
VIKTOR E. BENSON

MEMORANDUM

I wish to note that I am uncertain whether Mass. R. Crim. P. 15 (b) (2) is a proper procedural vehicle for the defendants' contentions. I have assumed arguendo, but without intimating any decision on the point, that this procedure is available.

October 3, 1980

/s/_____
Associate Justice

A TRUE COPY:
ATTEST: /s/_____
Assistant Clerk

October 6, 1980

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

ALBERT B. BENSON ET AL., Petitioners,	)	
v.	)	Civil Action
	)	No. 81-101-G
SUPERIOR COURT DEPARTMENT OF THE TRIAL COURT OF MASSACHUSETTS ET AL., Respondents.	)	

MEMORANDUM OF DECISION

February 26, 1981

GARRITY, J.

The petitioners, Albert B. Benson and Viktor E. Benson, seek a writ of habeas corpus under 28 U.S.C. §§ 2241 and 2254 and seek declaratory and injunctive relief under 42 U.S.C. § 1983. The essential allegation of the petition is that a state court criminal indictment, No. 024292, for conspiracy to commit arson, would violate their constitutional rights embodied in the double jeopardy clause of the Fifth Amendment. For the reasons discussed below we deny the petitioners' writ and application for an injunction against the pending state criminal prosecution.

The essential facts underlying the petition involve a fire at a five-story commercial building at 101-109 State Street, Boston, Massachusetts, on December 20, 1978. On January 11, 1979 the petitioners were indicted by a Suffolk County grand jury

on charges of arson (Indictments Nos. 024294 and 024296), breaking and entering with the intent to commit arson (Indictments Nos. 024293 and 024295), and conspiracy to commit arson (Indictment No. 024292) in connection with the fire. The Commonwealth moved for trial against the petitioners on the substantive counts of arson and breaking and entering, on September 11, 1979. The Commonwealth could not have included in this trial the conspiracy indictment, by virtue of Mass. G.L. c. 278, § 2A, which proscribes the simultaneous trial of a conspiracy indictment with the substantive offense. On September 18, 1979 the jury returned verdicts of not guilty on the two substantive counts.

The petitioners next filed various motions to dismiss the conspiracy indictment in state court based on the doctrine of collateral estoppel and on the United States Supreme Court's decision in *Ashe* v. *Swensen*, 1970, 397 U.S. 436. These motions were denied in Superior Court in written memoranda and in August 1980 the petitioners filed in the Supreme Judicial Court, Single Justice Session, an application for leave to take an interlocutory appeal of the denial of their motion to prohibit trial on the conspiracy indictment. On October 3, 1980, after hearing, Justice Kaplan of the Supreme Court denied the petitioners' application without prejudice to the renewal of the contentions in the course of the proceedings. The petitioners are now awaiting trial on the conspiracy indictment.

We begin by noting that this petition is an appropriate case for the assertion of federal jurisdiction. First, it is essential that the petitioners have exhausted their state remedies before we may review the constitutional claim, 28 U.S.C. § 2254 (b) and (c). We are satisfied that the Bensons have exhausted their state remedies by virtue of their application to the single

justice of the Supreme Court.[1] Once the petitioners have exhausted available state remedies there is no further bar to the assumption of federal jurisdiction, "for the deference owed to the state judicial system demanded by principles of comity and federalism has been paid." *Drayton* v. *Hayes*, 2 Cir., 1979, 589 F.2d 117, 120. It is especially appropriate to assume jurisdiction to consider the merits of a pretrial writ of habeas corpus where the petitioner claims the trial would place him in double jeopardy in violation of the Constitution. *See Green* v. *United States*, 1957, 355 U.S. 184, 187.

Second, the doctrine of *Younger* v. *Harris*, 1971, 401 U.S. 37, by which federal courts abstain from interference with state court criminal proceedings absent extraordinary circumstances, does not prevent review of this claim. In this case a prosecution against the petitioners on the conspiracy indictment, if taken in violation of their right to be free from double jeopardy, would be an exceptional circumstance threatening irreparable injury to the petitioners. *See Kugler* v. *Helfant*,

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[1] The respondents assert that the Bensons could raise their double jeopardy claim upon an appeal from a conviction on the conspiracy counts. However, such an appeal would be wholly inadequate to protect the defendants' fifth and fourteenth amendment rights where the trial itself would violate them. *Drayton* v. *Hayes*, 2 Cir., 1979, 589 F.2d 117, 121.

A second ground is advanced by respondents to support the argument that the petitioners have failed to exhaust state remedies, viz., that the petitioners did not appeal to the full court of the Supreme Judicial Court Justice Kaplan's decision to dismiss their application for leave to take an interlocutory appeal. This failure is not fatal to habeas corpus review under the circumstances of this case. The substance of petitioner's double jeopardy claim raised in this habeas proceeding has been considered and rejected three times in state court, resulting in two written memoranda of decision. *See Commonwealth* v. *Benson*, Superior Court No. 024292 (Mass. Dec. 20, 1979) (Hayes, J.) and *Commonwealth* v. *Benson*, Superior Court No. 024292 (Mass. June 23, 1980) (O'Neil, J.). We accept petitioners' point that the decision of the single justice to deny leave to file an interlocutory appeal is discretionary and, as a practical matter, non-reviewable.

1975, 421 U.S. 117, 125, *rehearing denied* 421 U.S. 1017. We therefore proceed to consider the merits of the petitioners' double jeopardy claim.

The petitioners do not contend that the conspiracy prosecution is barred because they have already been placed in jeopardy for the same offense. Rather they contend that the doctrine of collateral estoppel precludes their trial on the conspiracy charges. The Supreme Court held the doctrine of collateral estoppel to be a part of the constitutional guarantee against double jeopardy in *Ashe* v. *Swensen*, *supra*. This doctrine means that "when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." *Ashe*, *supra*, at 443. Collateral estoppel protects criminal defendants from redetermination of evidentiary facts and ultimate facts. *See United States* v. *Lee*, 5 Cir., 1980, 655 F.2d 787, 789.

When a defendant seeks to raise the defense of collateral estoppel to a prosecution, the court must examine the record of the first trial to determine what facts have been or should be deemed to have been determined in the first trial. *United States* v. *Lee*, *supra*, at 790. The subsequent prosecution will be precluded only if the jury in the first trial could not have rationally based its verdict on an issue other than the one the defendant seeks to foreclose. *United States* v. *Smith*, 5 Cir., 1973, 470 F.2d 1299, 1301.

Collateral estoppel may have two distinct effects on the subsequent prosecution. First, the subsequent prosecution may be completely barred if one of the facts necessarily determined in the former trial is an essential element to the conviction in the second trial. *See, e.g., Ashe, supra*; and *United States* v. *Kramer*, 2 Cir., 1961, 289 F.2d 909. The second effect, and the one we believe to be most applicable in this case, is where the subsequent prosecution may proceed but collateral estoppel

will bar the introduction of particular arguments and facts necessarily established in a prior proceeding. *See United States* v. *Lee*, *supra*, at 790; and *United States* v. *Cioffi*, 2 Cir., 1973, 487 F.2d 492, 498. The issue presented in this case is whether the petitioners' prosecution on the conspiracy indictment is barred because some fact necessarily determined in their favor by the general verdict of acquittal on the substantive counts of arson is an essential element to the conspiracy conviction the Commonwealth seeks.

After an extensive review of the record of the trial on the arson and the breaking and entering indictments, we find that it is impossible to determine with certainty precisely what the jury in these prosecutions had decided. According to the petitioners' analysis, the jury verdict was based on a finding that the petitioners had no responsibility whatsoever for the fire at 101-109 State Street. We cannot agree. At the trial the petitioners did not dispute the fact that they were present in the building immediately before the fire erupted, nor that the fire in the building was set. The defense emphasized the facts that a number of other people were present in the building when the fire broke out, that there were many entrances and exits to the building and that no trace of alcohol or fire accelerants was found on the clothing of the petitioners. Therefore the only fact which might be said to be necessarily determined in the petitioners' favor is the issue of the identity of the person or persons who actually set the fire in the building, i.e., that petitioners did not set the fire. Whether or not the petitioners were involved in a conspiracy with other persons on the premises or elsewhere at the time of the fire cannot have been determined by the acquittal in the first trial. Thus the Commonwealth will be foreclosed from claiming or arguing that the petitioners set the fire in the building. However, that alone would not be enough to bar prosecution of the conspiracy indictment since proof of that fact is not essential to the govern-

ment's successful prosecution of that indictment. The petition for the writ of habeas corpus and for declaratory injunctive relief is therefore denied.

/s/ _____
W. Arthur Garrity, Jr.
United States District Judge

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

ALBERT B. BENSON ET AL., Petitioners,	)	
v.	)	Civil Action
	)	No. 81-101-G
SUPERIOR COURT DEPARTMENT OF THE TRIAL COURT OF MASSACHUSETTS ET AL., Respondents.	)	

AMENDMENT OF MEMORANDUM OF DECISION DATED FEBRUARY 26, 1981

March 6, 1981

GARRITY, J.

Upon consideration of petitioners' motion for reconsideration filed March 5, 1981, the third from the last sentence in the court's memorandum of decision dated February 26, 1981 is hereby amended by the addition of the words "or that they did aid, counsel or procure the burning of the building." so that the third from last sentence will now read as follows:

> Thus the Commonwealth will be foreclosed from claiming or arguing that the petitioners set the fire in the building or that they did aid, counsel or procure the burning of the building.

Further changes or clarifications sought in petitioners' motion for reconsideration, in particular those numbered 2 and 3,

are denied. With respect to the second point, that the jury could only have concluded that the petitioners did not have the intent to commit arson when they entered the building, we disagree. There is testimony that the petitioners had a key to the building and were engaged in contracting work on the premises with the consent of the owner. Therefore, we cannot say that any one fact was necessarily determined by the petitioners' acquittal of the count for breaking and entering with intent to commit arson. The third point raised by the defendants is that the Commonwealth is precluded from asserting that the petitioners conspired with any other persons to set the fire in the building. This contention we reject based on the Commonwealth's representation at oral argument that they expect to produce evidence of a conspiracy whose membership included a person or persons in addition to the petitioners.

/s/_____

W. Arthur Garrity, Jr.
United States District Judge

United States Court of Appeals
For the First Circuit

No. 81-1162

ALBERT B. BENSON and VIKTOR E. BENSON,
PETITIONERS, APPELLANTS,

v.

SUPERIOR COURT DEPARTMENT OF THE TRIAL COURT OF MASSACHUSETTS
and
FRANCIS X. BELLOTTI, AS HE IS ATTORNEY GENERAL OF THE COMMONWEALTH OF MASSACHUSETTS,
RESPONDENTS, APPELLEES.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
[HON. W. ARTHUR GARRITY, JR., *U.S. District Judge*]

Before
COFFIN, *Chief Judge*,
VAN DUSEN, *Senior Circuit Judge**
BOWNES, *Circuit Judge*.

John C. Martland and *Murray P. Reiser*, with whom *Jordan L. Ring*, *Ring and Rudnick*, and *Reiser and Rosenberg* were on brief, for appellants.

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* Of the Third Circuit, sitting by designation.

John J. Bonistalli, Special Assistant Attorney General, with whom *Francis X. Bellotti*, Attorney General and *Stephen R. Delinsky*, Assistant Attorney General, Chief, Criminal Bureau, were on brief, for appellees.

November 9, 1981

COFFIN, *Chief Judge*. Appellants, previously acquitted of the charges of arson and breaking and entering with intent to commit arson, now face trial on the charge of conspiring to commit arson. They come before us claiming that the double jeopardy clause bars their prosecution for the crime of conspiracy, or, alternatively, that collateral estoppel, as embodied in the double jeopardy clause, limits the facts and issues that can be litigated during the trial on the conspiracy charge. They seek relief under 42 U.S.C. § 1983 and our habeas corpus jurisdiction.

I.

On the evening of December 20, 1978, Massachusetts state police observed appellants, Albert and Viktor Benson, entering and exiting from an office building that erupted into fire shortly after their departure. The Bensons were arrested and, indicted with identical charges of arson, breaking and entering with intend to commit arson, and conspiracy to commit arson. Because Massachusetts law at that time prevented the Commonwealth from trying them for the substantive crimes at the same time it tried them for conspiracy to commit the same substantive crimes, Mass. Gen. Laws ch. 278, § 2A (repealed 1979), the Commonwealth chose to prosecute first for the substantive crimes. Appellants were acquitted.

The state subsequently undertook to start proceedings on the conspiracy count. Although the state admits that it has no direct evidence of a conspiracy, it seeks to prove conspiracy by use of inferential and circumstantial evidence. Appellants have argued that, given the wording of the instructions to the jury, the acquittal on the charges of the substantive crimes included an acquittal on the conspiracy charge. Their primary contention, however, has been that the state does not have any substantial proof of conspiracy and that it will in fact try to prove conspiracy by trying to show that appellants actually set the fire and therefore must have participated in an agreement between themselves sufficient to constitute a conspiracy.

Appellants raised these objections before the state trial court by filing a pre-trial motion to dismiss, alleging that double jeopardy requires that the entire proceeding be barred because the facts the government will try to prove have already been found in their favor, and by filing a motion *in limine* requesting the court to issue an order to prevent the government from reintroducing facts and theories of facts that were rejected at the first trial. The Massachusetts Superior Court denied both motions.

Appellants appealed these decisions to the extent of filing with one member of the Massachusetts Supreme Judicial Court an application for leave to take an interlocutory appeal. Apparently because the Massachusetts Rules of Criminal Procedure specifically allow a defendant to raise on an interlocutory appeal issues spurred by a ruling on a motion to suppress, appellants characterized the trial court's rulings as refusals to suppress evidence. *See* Mass. R. Crim. P. 15(b)(2). The Justice to whom they appealed denied their application without prejudice to their right to renew the objections in the course of the trial proceedings.

Thereupon, appellants filed suit in the federal district court, seeking a writ of habeas corpus barring the prosecution or a

writ barring the relitigation of all issues and facts necessarily determined in their favor at the previous trial. They also alleged that under § 1983 they were entitled to a declaratory order dismissing the indictment or both declaratory and injunctive relief preventing the Commonwealth from relitigating issues previously determined. Finding that it had jurisdiction to address these claims, the district court concluded that the double jeopardy clause does not require that the prosecution be barred. It did, however, issue an order stating that the Commonwealth is foreclosed from claiming or arguing that appellants set the fire or aided, counseled or procurred the burning of the building.

II.

We address first the question whether the double jeopardy clause requires that the prosecution on the conspiracy charge be barred by the acquittal on the substantive crimes. This question is framed by appellants both as a petition for a writ of habeas corpus under 28 U.S.C. §§ 2241 and 2254 and as a prayer for a declaratory order under 42 U.S.C. § 1983.

With respect to the petition for a writ of habeas corpus, our primary concern is whether appellants have properly exhausted their claim. Exhaustion presents a peculiar question in the context of a petition for a writ of habeas corpus brought *before* the state proceeding has even begun. Section 2254, which requires exhaustion, applies only to petitions filed *after* the state has rendered a judgment and hence affords neither a source of power nor a definition of exhaustion applicable to this case. Section 2241, which empowers courts to issue writs and makes no mention of exhaustion, has been interpreted to allow a court to grant a writ before a defendant has exhausted his claim at trial, but only in unusual circumstances. *See*

Ex Parte Royall, 117 U.S. 241, 251-53 (1886). The Supreme Court has reasoned that federal courts, despite their power to issue writs, must respect the authority and ability of state courts to protect constitutional rights in the first instance. *See Braden* v. *30th Judicial Circuit of Kentucky*, 410 U.S. 484, 489-90 (1973); *Ex Parte Royall*, *supra*, 117 U.S. at 251-53. Thus, while it may be possible for a court to consider issuing a writ before the trial has taken place and before the state court has had a chance to decide the constitutional issue, the circumstances under which this should be allowed must be very carefully examined. *See generally Moore* v. *DeYoung*, 515 F.2d 437 (3d Cir. 1975).

We have in the past implicitly recognized that a threat to a defendant's right to be protected from double jeopardy can be a sufficiently extraordinary circumstance to allow a federal court to review a petition for a writ of habeas corpus without awaiting exhaustion of the claim by completion of the state trial. *See Reinstein* v. *Superior Court Dept. of the Trial Court of Massachusetts*, No. 81-1050 (1st Cir. Sept. 30, 1981). This recognition is well-founded. Because the double jeopardy clause is designed to protect a defendant not only from double conviction but also from being subjected twice to the trial process itself, *Green* v. *United States*, 355 U.S. 184, 187 (1957), a federal court is in the extraordinary position of having no way to protect a defendant's constitutional right other than to consider a petition before trial. *See generally Drayton* v. *Hayes*, 589 F.2d 117, 120-21 (2d Cir. 1979); *United States ex rel. Triano* v. *Superior Court of New Jersey*, 393 F.Supp. 1061, 1067 (D.N.J. 1975), *aff'd without opinion*, 523 F.2d 1052 (3d Cir. 1975), *cert. denied*, 423 U.S. 1056 (1976); *Grizzle* v. *Burner*, 387 F. Supp. 1, 4-5 (W.D.Okla. 1975).

Recognition of the general principle that a petition based on a double jeopardy claim may be considered before trial does not mean, however, that a defendant is relieved of all responsi-

bility to exhaust what pre-trial opportunities he may have to raise the claim before the state court. It is with a sense of cautiousness in keeping with the comity concerns underlying the exhaustion doctrine that we examine the measures appellants have taken to exhaust their claim that the prosecution should be barred.

Appellants did present the allegation that the double jeopardy clause requires dismissal of the conspiracy indictment to the trial court by filing a motion to dismiss. When their motion was denied, however, they sought interlocutory appeal from one member of the Supreme Judicial Court only to the extent of arguing that the double jeopardy clause required granting of their motion for "suppression of the evidence", not as here, that the prosecution should be barred. The Supreme Court clearly has required that the claim exhausted in the state court be the same claim presented in federal court. *Picard* v. *Connor*, 404 U.S. 270, 276 (1971). There can be no question here that the application for leave to file a petition for interlocutory appeal did not raise precisely the same issue presented in this petition for a writ of habeas corpus. Despite the wording of the Massachusetts Rules of Criminal Procedure which explicitly recognize interlocutory appeal only for decisions on suppression motions, appellants could — and still can — appeal to the Massachusetts Supreme Judicial Court under its supervisory power. *See Mass. Gen. Laws* ch. 211 § 3; *Fadden* v. *Commonwealth*, 382 N.E.2d 1054, 1056 (Mass. 1978). We therefore find that the unusual circumstances justifying jurisdiction over a pre-trial petition for a writ of habeas corpus do not exist in this instance.

Appellants also seek to bar the prosecution by arguing that prosecution would violate § 1983 and that § 1983 entitles them to a declaratory order dismissing the trial. Although this request for relief would raise significant questions under the abstention doctrine as set forth in *Younger* v. *Harris*, 401 U.S.

37 (1971), and as applied to declaratory relief in *Samuels* v. *Mackell*, 401 U.S. 66 (1971), we need not reach the question whether interference with the state judicial process would be fitting in these circumstances. Appellants' argument that their constitutional rights will be violated if the trial on the conspiracy charge proceeds does not withstand analysis.

We do not question the rule that the doctrine of collateral estoppel can bar a subsequent prosecution. *Ashe* v. *Swenson*, 397 U.S. 436, 445-46 (1970). Applying that principle, we do not view the jury's verdict in the first case as precluding prosecution of the second case. We accept the trial court's finding that the verdict did not acquit appellants of conspiring to set the fire, despite the fact that they were acquitted of a charge that they did "aid, counsel and procure" the burning of the building.[1]

Beyond arguing that collateral estoppel bars prosecution on the conspiracy charge because an element of the crime has already been found in their favor — the argument we have just rejected — appellants argue that collateral estoppel bars the trial because the government does not have sufficient evidence to prove an illegal agreement if it cannot relitigate the substantive crimes to the extent of creating the inference that appellants committed arson and therefore must have conspired. Certainly, collateral estoppel prevents the government from relitigating the previous acquittals, *see* section III, *infra*, but beyond this point, appellants' argument raises noth-

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[1] In ruling on appellants' pre-trial motion to dismiss, the Superior Court found that the charge to the jury and the language of the indictment meant that appellants were being charged with a joint criminal enterprise, not conspiracy. Proof of the former required proof that appellants participated in the commission of the crimes, while proof of the latter requires an element not common to the former — proof of an unlawful agreement. Thus, the trial court concluded that appellants had not been acquitted of the charge of making an illegal agreement. We accept this interpretation and application of Massachusetts law.

ing more than an issue of the sufficiency of the evidence. This is a question that must be presented to the trial court in the form of a motion for acquittal; it is not to be put before the federal courts in the guise of a constitutional issue. We therefore conclude that collateral estoppel, as applied through the double jeopardy clause, does not bar appellants' prosecution on the charge of conspiracy.

III.

Alternatively, appellants seek a writ barring the relitigation of all facts and issues necessarily determined in their favor at the previous trial as well as declaratory and injunctive relief to the same effect under § 1983. The prayer for relief under our habeas corpus jurisdiction is inappropriate, for the only relief we can give is to release the supplicant from custody. As to the prayer for relief under § 1983, we hold that the case is not ripe for our consideration.

The doctrine of collateral estoppel as incorporated into the double jeopardy clause can not only bar a prosecution but it can also prevent the relitigation of specific facts and issues necessarily found in a defendant's favor at a previous trial. *See United States* v. *Lee*, 622 F.2d 787, 790 (5th Cir. 1980); *United States* v. *Cioffi*, 487 F.2d 492, 498 (2d Cir. 1973), *cert. denied*, 416 U.S. 995 (1974). Appellants fear that the Commonwealth will try to relitigate the issue whether appellants set the fire and hence they seek our protection. At this juncture, however, there is no way of knowing how the state will try to marshal its evidence and what points it will try to prove. Until it becomes evident that the government is attempting to encroach on appellants' right to be free from double jeopardy, there is no case or controversy that can be brought before this

court.[2] We are not about to set ourselves up as Friday afternoon quarterbacks. In reaching this result, we note that it is not necessary for us to consider whether intervention would ever be appropriate should a defendant dispute a trial court's ruling during trial that the collateral estoppel principles had not been violated.

In conclusion, we find that the habeas corpus claim that the prosecution be barred is not properly before the court and that appellants' prayer for the same relief under § 1983 is without merit. The claim that the double jeopardy clause requires this court to impose orders or injunctions regulating what evidence may be admitted at trial is found not to be justiciable. Accordingly, in order to prevent possible misunderstanding by the state trial court, we vacate that part of the district court's February 26, 1981, Memorandum of Decision, as amended on March 6, 1981, foreclosing the Commonwealth from offering specific evidence at the trial on the conspiracy charge, and affirm the judgment of March 13, 1981, directing "that the petition for writ of habeas corpus and for declaratory injunctive relief be, and it is hereby, denied".

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[2] We note that when the trial court denied appellants' pre-trial motion *in limine* that requested an order stating that certain issues could not be litigated, it denied the motion without prejudice to appellants' opportunity to file another motion when the state presented its case. It would seem that the trial court had similarly recognized that the issue was not ready for resolution. This approach does not leave appellants without a way to protect their constitutional rights.

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS. SUPERIOR COURT
CRIMINAL
NO. 024292

COMMONWEALTH

vs.

ALBERT B. BENSON & ANOTHER[1]

REPORT

(*Pursuant to Mass. R. Crim. P. 34*)

Being of the opinion that, prior to trial, questions of law have arisen which I, as trial judge, determine are both so important and so doubtful as to require the decision of the Appeals Court, I hereby report this case to the Appeals Court, pursuant to the provisions of Mass. R. Crim. P. 34, so far as is necessary to present the following questions of law arising therein:

(1) Whether, under the circumstances of this case, the doctrine of collateral estoppel, as embodied in the double jeopardy clause of the Fifth Amendment to the Constitution of the United States, bars the prosecution of the defendants for the crime of conspiracy to commit arson?

(2) Whether, alternatively, that doctrine bars the relitigation of all facts and issues that were necessarily determined in the defendants' favor at their trial on the indictment charging the substantive crime of arson?

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[1] Viktor E. Benson.

(3) Given that the only evidence which the Commonwealth can and will adduce at the trial of the defendants on a conspiracy-to-commit-arson indictment is that evidence which the Commonwealth by memorandum and in open court has heretofore asserted it will produce,[2] and nothing more, whether such a trial of the defendants, acquitted on substantive arson indictments involving the same property, is now barred by double jeopardy or collateral estoppel principles?

Given the factual background of the instant case, its complex procedural history to date, and the nature of the evidence expected to be presented by the Commonwealth, a pre-trial appellate determination of the Commonwealth's rights under double jeopardy and collateral estoppel principles to put the defendants to what will be an extended trial on the conspiracy indictment following their acquittal after trial of the "substantive" arson indictments will, in the judgment of the undersigned justice, expedite the eventual determination of the conspiracy indictment, conserve judicial time and effort, ensure against possible unnecessary expense, and serve the ultimate interest of justice for both the Commonwealth and the defendants.[3]

In order to assist the Appeals Court in its determination of the issues reported, the court submits with this Report an *Appendix* containing various relevant papers, including copies of docket entries, the several Indictments, decisional memoranda

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[2] See, in particular, Items Nos. 15 and 26 in the accompanying Appendix.

[3] Prosecution of this criminal case commenced on January 11, 1979 and has already necessitated the judicial attention of: (1) at least three Superior Court justices, including the undersigned, two of whom have written detailed legal memoranda on the points involved, (2) two single justices of the Supreme Judicial Court, (3) a judge of the United States District Court for the District of Massachusetts who rendered two written memoranda, and (4) the United States Court of Appeals for the First Circuit, which also handed down a detailed opinion.

of the Superior Court (Hayer and O'Neil, JJ), memoranda and opinion of the United States District Court for the District of Massachusetts and the Court of Appeals for the First Circuit, motions to dismiss and for other relief, statements of the Commonwealth's expected evidence at trial, and other court papers which should provide an adequate record upon which the reported issues may be determined.

In accordance with the provisions of Rule 34, this case has been continued for trial to await the decision of the Appeals Court.

/s/ _____
James P. Lynch, Jr.
Justice of Superior Court

Dated: July 15, 1982

COMMONWEALTH OF MASSACHUSETTS.

SUPREME JUDICIAL COURT FOR THE COMMONWEALTH,

AT BOSTON,

June 15, 1983

IN THE CASE NO. SJC-2996

COMMONWEALTH

vs.

ALBERT B. BENSON & another

pending in the Superior Court Department of the Trial Court for the County of Suffolk No. 024292

ORDERED, that the following entry be made in the docket; viz., —

The answers to the questions reported are: (1) "No"; (2) "No"; (3) "No." The case is to stand for trial.

BY THE COURT,

/s/_____, Clerk

June 15, 1983.
See opinion on file.

Commonwealth vs. Viktor E. Benson & Albert B. Benson

Offense

Conspiracy, violation of General laws, chapter 266, section 2

Attorney

M. Reisner for V. Benson - 1/17/79
J. Ring for A. Benson - 1/17/79
No. 024292

Paper No.	Date of Filing	(024292-96)
1	Jan. 11, 1979	Indictment returned.
	Feb. 13, 1979	
25		motion for a Bill of Particulars -Albert B. Benson
38		Motion for bill of particulars Viktor E. Benson
51		Commonwealth's response to defendant's motion for Bill of Particulars I
78	April 2, 1979	Pre-trial conference stipulation filed.
102		Motion to dismiss indictment
105		Defendant Viktor Benson files: Motion to dismiss indictment;
110	Dec. 26, 1979	Court, Hayer, J., files: Rulings and Decision on Motion to Dismiss denying same.
115	Mar. 19, 1980	motion in Limine I
	Apr. 15, 1980	Court reads into the record oral Order re: the admissability of certain evidence in this case,
131	Apr. 22, 1980	Defendants' file motion to dismiss IV
	June 23, 1980	Court, O'Neil, J., files Memorandum in Limine I and in motion to dismiss IV in which both motions are denied without prejudice,

COMMONWEALTH OF MASSACHUSETTS

024292

SUFFOLK, ss. At the Superior Court Department of the trial court, begun and holden at the City of Boston, within and for the County of Suffolk, for the transaction of Criminal Business, on the first Monday of January in the year of our Lord one thousand nine hundred and seventy-nine.

THE JURORS for the COMMONWEALTH OF MASSACHUSETTS on their oath present that

VIKTOR E. BENSON
ALBERT B. BENSON

on December 20, 1978, and on divers other dates, did conspire together to wilfully and maliciously cause a building to be burned, and did conspire together to aid, counsel and procure the burning of a building situated at 101-109 State Street, Boston, in said County of Suffolk.

A TRUE BILL

/s/_____
Foreman of the Grand Jury

/s/_____
Assistant Attorney General

COMMONWEALTH OF MASSACHUSETTS

024294

SUFFOLK, ss. At the Superior Court Department of the trial court, begun and holden at the City of Boston, within and for the County of Suffolk, for the transaction of Criminal Business, on the first Monday of January in the year of our Lord one thousand nine hundred and seventy-nine.

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A TRUE BILL

/s/_____
Foreman of the Grand Jury

/s/_____
Assistant Attorney General

COMMONWEALTH OF MASSACHUSETTS

024296

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A TRUE BILL

/s/_____
Foreman of the Grand Jury

/s/_____
Assistant Attorney General

COMMONWEALTH OF MASSACHUSETTS

024293

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THE JURORS for the COMMONWEALTH OF MASSACHUSETTS on their oath present that

VIKTOR E. BENSON

on December 20, 1978, did break and enter in the night time the building of Thomas Groom & Co., Incorporated situated at 101-109 State Street in Boston, with the intent to commit a felony: to wit arson.

A TRUE BILL

/s/_____
Foreman of the Grand Jury

/s/_____
Assistant Attorney General

COMMONWEALTH OF MASSACHUSETTS

024295

SUFFOLK, ss. At the Superior Court Department of the trial court, begun and holden at the City of Boston, within and for the County of Suffolk, for the transaction of Criminal Business, on the first Monday of January in the year of our Lord one thousand nine hundred and seventy-nine.

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A TRUE BILL

/s/_____
Foreman of the Grand Jury

/s/_____
Assistant Attorney General

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS

SUPERIOR COURT
CRIMINAL NO. 024292

COMMONWEALTH OF MASSACHUSETTS
Plaintiff

v.

ALBERT B. BENSON and VIKTOR E. BENSON
Defendant

Defendant, Albert B. Benson's Motion for a Bill of Particulars

The defendant, Albert B. Benson, moves this Honorable Court that the Commonwealth be ordered to file a written Bill of Particulars specifying the following as to the above-numbered indictment:

1. The precise time of day in which the alleged offense was committed.
2. The precise location where the alleged offense was committed, including (a) the city or town in the Commonwealth where the alleged offense took place (b) the streets and buildings, if any, where the alleged offense was committed.
3. As precisely as possible the manner in which the alleged offense was committed.
4. The means by which the Commonwealth alleges that the offense took place.
5. The "diverse other dates" alluded to on the face of the above-numbered indictment.

In support of the foregoing, the defendant, Albert B. Benson, states:

1. The indictment was not sufficiently clear to enable the defendant to prepare his defense;
2. The particulars sought by this motion are not in the possession of the defendant and are otherwise not procurable by him reasonably in advance of trial;
3. The request for the particulars sought by this motion is made in good faith and with no intents to delay the trial or require the disclosure of purely evidential materials contained in the Comonwealth files.

ALBERT B. BENSON
By his attorney,

By: _____

JORDAN L. RING
RING & RUDNICK
55 Union Street
Boston, Mass. 02108
(617) 523-0250

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

SUPERIOR COURT DEPARTMENT
CRIMINAL NO. 024292

COMMONWEALTH OF MASSACHUSETTS	)
VS.	) MOTION OF THE DEFENDANT VIKTOR E. BENSON FOR A BILL OF PARTICULARS
VIKTOR E. BENSON and ALBERT B. BENSON	)

The defendant Viktor E. Benson moves this Honorable Court that the Commonwealth be ordered to file a written Bill of Particulars specifying the following as to the above-numbered indictment.

1. The precise time of day in which the alleged offense was committed;
2. The precise location where the alleged offense was committed, including (a) the city or town in the Commonwealth where the alleged offense took place and (b) the streets and buildings, if any, where the alleged offense was committed;
3. The "divers other dates" on which the alleged offense was committed;
4. Whether or not there were or are any co-conspirators who were not indicted. If the answer to the foregoing is in the affirmative, the name and address of each such unindicted co-conspirator;
5. As precisely as possible, the act or acts which the Commonwealth alleges were carried out in furtherance of the conspiracy;

6. The name and address of each and every co-conspirator who was indicted;
7. As precisely as possible the manner in which the defendants did conspire together to wilfully and maliciously cause a building to be burned;
8. As precisely as possible the manner in which the defendants did conspire together to aid, counsel and procure the burning of a building situated at 101-109 State Street, Boston, Massachusetts;
9. The means by which the Commonwealth alleges that the defendants did conspire together to wilfully and maliciously cause a building to be burned;
10. The means by which the Commonwealth alleges that the defendants did conspire together to aid, counsel and procure the burning of a building situated at 101-109 State Street, Boston, Massachusetts.

In support of the foregoing, the defendant Viktor E. Benson states:

1. The indictment was not sufficiently clear to enable the defendant to prepare his defense;
2. The particulars sought by this motion are not in the possession of the defendant and are otherwise not procurable by him reasonably in advance of trial;
3. The request for the particulars sought by this motion is made in good faith and with no intents to delay the trial or require the disclosure of purely evidential materials contained in the Commonwealth files.

VIKTOR E. BENSON
By his Attorney,

Murray P. Reiser, Esquire
73 Tremont Street
Boston, MA 02108
742-1810

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

SUPERIOR COURT DEPARTMENT
CRIMINAL NO. 024292

COMMONWEALTH OF MASSACHUSETTS VS. VIKTOR E. BENSON and ALBERT B. BENSON	) COMMONWEALTH'S) RESPONSE TO) DEFENDANT'S MOTION) FOR BILL OF) PARTICULARS

Now comes the Commonwealth in the above entitled matter and responds as follows:

1. On December 20, 1978, and divers other dates prior to that. At this time, the Commonwealth is unable to specify dates.

2. 101-109 State Street, Boston, Massachusetts and divers other locations which the Commonwealth is unable to specify.

3. See Paragraph 1.

4. The Commonwealth is unable to specify the names of any other co-conspirators at this time.

5. On December 20, 1978, the defendant entered 101-109 State Street, Boston and did aid, counsel, procure and cause that building to burn.

6. Albert B. Benson.

7. The defendant did agree with Albert B. Benson to wilfully and maliciously aid, counsel, procure and cause the building at 101-109 State Street, to burn.

8. See Paragraph 7.

9. Viktor E. Benson and Albert B. Benson did agree with each other to wilfully and maliciously aid, counsel, procure and cause the building at 101-109 State Street to burn.

10. See Paragraph 9.

Respectfully submitted,

FRANCIS X. BELLOTTI
ATTORNEY GENERAL

By: _____

John J. Bonistalli
Assistant Attorney General
Criminal Bureau
One Ashburton Place
Boston, MA 02108
Tel. 727-2240

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

SUPERIOR COURT
CRIMINAL NOS. 024292,
024293, 024294,
024295 and 024296

COMMONWEALTH OF MASSACHUSETTS Plaintiff	
V.	PRE-TRIAL CONFERENCE
ALBERT B. BENSON and VIKTOR E. BENSON, Defendants	STIPULATION

The Commonwealth, through its Assistant Attorney General, John Bonistalli, and defendants, Albert B. Benson through his attorney, Jordan L. Ring, and Viktor E. Benson through his attorney, Murray P. Reiser, having conferenced the above-captioned case, have stipulated that the following entries may be made upon the docket pertaining to Motions made by the defendants, as follows:

1. **Motion for Grand Jury Minutes.** Allowed.
2. **Motion for Witnesses Summoned to Testify Before the Grand Jury.** Allowed.
3. **Motion for Exculpatory Evidence.** Allowed.

4. **Motion for Promises, Reward or Inducements.** The Motion is allowed and the Commonwealth states there were none.
5. **Motion to Impose a Gag Order.** Allowed, as it pertains only to this particular criminal action.
6. **Motion for a Bill of Particulars Re: Burglary, # 024295 and 024293.** Motion was allowed, and the Commonwealth provided written responses to said Motion. At the conference, the Commonwealth further stated:
   a. Mr. Bonistalli will check the Commonwealth's reports to determine which defendant had the keys to open the door at 101-109 State Street.
   b. Mr. Bonistalli will determine how many of the other keys found in the defendant's possession fit the doors at 101-109 State Street.
   c. Regarding the Accelerant, the Commonwealth, for all the indictment, will only rely on the information contained in the police laboratory reports.
   d. Mr. Bonistalli said there was no evidence of a time fuse or any other device to start a fire at the scene of the fire.
   e. Two plastic bags were found on the floor at the scene of the fire.
7. **Motion for a Bill of Particulars Re: Arson, # 024296 and 024294.** Motion was allowed and complied with, and the Commonwealth further stated that the fire was started in the office located on the second floor of the building.
8. **Motion for a Bill of Particulars Re: Conspiracy, # 024292.** Motion was allowed and complied with, and the Commonwealth further stated:
   a. Mr. Bonistalli said there is no direct evidence pertaining to "diverse other times", and that the Commonwealth will only rely on inference to prove said meetings.

b. The Commonwealth has no statements to support the allegations contained in Paragraph 3 relating to an agreement to commit arson.

c. The Commonwealth has no direct evidence relating to a conspiracy, but if such evidence is discovered, Mr. Bonistalli will so inform defense counsel.

9. **Motions Re: Statements of the Defendants.** Motions were allowed and complied with, and the Commonwealth further stated:

   a. The Commonwealth does not possess any oral or written statements from either defendant.

   b. First Security, Inc. does not possess any oral or written statements from either defendant.

10. **Motion to Inspect Physical Evidence.** Motion was allowed, and it was further agreed that the defendants' expert witness is to contact the Commonwealth's expert witness to determine a mutually convenient time to inspect said evidence.

11. **Motion to be Furnished with Identities of All Persons at the Scene of the Arrest.** Motion was allowed and complied with, and the Commonwealth further stated that:

   a. No one was inside the building at 101-109 State Street for the Commonwealth. The Bensons were observed entering and leaving the building, but no one observed their activities inside the building.

   b. First Security, Inc. was not paid by the Commonwealth.

   c. The Commonwealth had two persons positioned inside a vacant restaurant on Doane Street for surveillance purposes.

12. **Motion for a list of Commonwealth's Witnesses.** Motion was allowed and complied with, and the Commonwealth further stated that:

a. Thomas Groom's attorneys are John Fox and Frank Crosson.
b. No one from First Security, Inc. is expected to testify at the trial.
c. The informant will not testify at the trial.

13. **Motion for Information Pertaining to Surveillance.** Motion was allowed and complied with, and the Commonwealth further stated that:
    a. The surveillance reports were forwarded to defense counsel.
    b. There was no surveillance done on the Bensons prior to 12/20/78.
    c. First Security, Inc. does not have any surveillance on the Bensons, to the Commonwealths knowledge at this time.
    d. Mr. Bonistalli indicated that the Commonwealth has no electrical surveillance on the Bensons or any other person on matters concerning any indictments whatsoever.
    e. The Commonwealth does not have any film of the said activities, but the police reports will indicate that they saw activity on the third and fourth floors of the building.
    f. Mr. Bonistalli indicated that the fire department checked the building after the fire to see if anyone else was inside, Mr. Bonistalli will determine the extent thereof.
14. **Motion for a List of All Personal Property Found On or About the Defendants at the Scene of the Alleged Crime.** Motion was allowed and complied with, and the Commonwealth further stated:
    a. Mr. Bonistalli will provide further information on the keys (see No. 6 above).

b. Mr. Bonistalli will find out where the police found the two sections of the plastic pail.

c. Regarding gloves — Mr. Bonistalli believes that Viktor Benson was wearing the gloves while inside the building and will check and confirm such information.

d. Guns -- Mr. Bonistalli stipulates that any attempts to introduce into evidence at the trial that the defendants were armed, will be made at the side bar with the judge and not be made in the form of any sensational questioning. A motion in limiting is to be heard before oral opening to the jury.

Inasmuch as the parties are unable to reach an agreement on the following defense motions, a Hearing will be held on April 2, 1979 at 9:30 a.m. to argue the Motions before the Court:

1. **Motion to Inspect Witnesses' Statements.** Motion was allowed in part, and defendant counsel seeks full compliance.
   a. The Commonwealth does not possess any written statement from Mr. Groom; however, the substance of any such conversarion with the police may be contained in the police reports which will be furnished to defense counsel.
   b. The Commonwealth is unwilling to reduce oral statements into written statements. The Defendants demand the production of all statements.
2. **Motion for Postponement of Trial Due to Pre-Trial Publicity.**
   a. Mr. Bonistalli was unwilling to agree to this Motion, as he felt a thorough voire dire hearing would cure any problems caused by the publicity.

b. Mr. Bonistalli is willing to stipulate that there was media coverage of the incident on 12/20/78.

c. Mr. Bonistalli was initially unwilling to provide us with copies of press releases issued from the Attorney General's Office. However, he later indicated a willingness to check the policy of the Attorney General's Office on such matters and if he receives an O. K., he will then furnish us copies of the press releases.

3. **Motion for Production of Laboratory Reports.**

a. Mr. Bonistalli indicated that the Commonwealth's expert witnesses would testify (a) as to the lack of any evidence of accidental causation of the fire, such as loose wiring; (b) as to the location and pattern of the fire, etc,; and (c) all leading to a conclusion of arson.

b. Defense counsel requested further evidence pertaining to the condition of the samples when delivered to the police laboratory (specifying whether said samples were wrapped or otherwise), the time of delivery and the actual date and time the samples were tested.

c. Mr. Reiser further requested that the Commonwealth provide defendants with the substance of the expert witnesses' testimony and the basis for their findings.

d. Mr. Bonistalli was unwilling to reduce all of this information to writing and suggested that counsel and/or defendants' expert witnesses contact the Police Laboratory directly.

e. Defense counsel are dissatisfied with Mr. Bonistalli's suggestion, as they anticipate extensive expert testimony at trial for each side, and are therefore afraid that the Commonwealth's experts will prove unac-

cessible and noninformative unless ordered by the Court to reduce to writing the basis for their findings.

4. **Motion for Information Pertaining to Informant.**
   a. Mr. Bonistalli is unwilling to give the identity of the informant or advise us as to what information was provided by the informant.
   b. Mr. Bonistalli's position is that this information is unnecessary as the Commonwealth's case is totally independent of such information and the informant will not testify at the trial.
   c. Defense counsel insisted upon the allowance of said Motion, as it could lead to exculpatory evidence, such as motive.
   d. Mr. Bonistalli then brought up his fear regarding the safety of the informant if the identity of the informant was made public.
   e. Mr. Reiser then suggested an in-camera session of the Court with the informant, but Mr. Bonistalli would not go along with this suggestion, either.
5. **Motion for Production of Police Department Records.**
   a. Mr. Bonistalli is only willing to produce actual police reports; said reports will be produced on March 20, 1979.
   b. Defense counsel insist that the notes and diaries of the investigating police officers also be produced to prevent any surprise at trial from police officers referring to something in their notes which is not included in the reports.
6. **Motion to Establish Motive.**
   a. This Motion was discussed after the conference, and will also have to be argued at the Hearing on April 2, 1979.

The following Motions require the authorization of the Court, and will also be presented for the Court's determination on April 2, 1979:

1. **Motion to Follow M. G. L. Chapter 278, Section 33 (a) - (g).**
2. **Motion to Furnish Criminal Records of Commonwealth Witnesses.**
3. **Motion to Allow the Jury to Take Notes.**

The parties hereby agree that the above memorandum and stipulation is a fair and accurate record of the pre-trial conference held on March 15, 1979.

For the Commonwealth:

_____

John Bonistalli
Assistant Attorney General

For the defendant,
Albert B. Benson:

_____

Jordan L. Ring

For the defendant,
Viktor E. Benson:

_____

Murray Reiser

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS	SUPERIOR COURT No. 024292
COMMONWEALTH OF MASSACHUSETTS v. ALBERT B. BENSON and and VIKTOR E. BENSON	AFFIDAVIT OF JORDAN L. RING IN SUPPORT OF LIMINE-1

I, Jordan L. Ring, attorney for the Defendant Albert B. Benson, do hereby dispose and state under oath that based upon information and belief the opening statement at the trial of the-above-referenced indictment by John Bonistalli, Assistant Attorney General and the Prosecutor of the within action, will show that the Commonwealth intends to introduce the following evidence to prove the alleged agreement of Albert Benson and Viktor Benson to commit arson at 101-109 State Street, Boston, Suffolk County, Massachusetts, on December 20, 1978.

I. The Commonwealth will introduce evidence that on December 20, 1978 State Police Officers assigned to the Attorney General's Office conducted a surveillance of the five story commercial building located at 101-109 State Street and that said surveillance was designed to result in placing Albert B. Benson and Viktor E. Benson under arrest for arson and breaking and entering with the intent to commit a felony, to wit; arson. The evidence of the State Police Troopers will include the following:

A. *Lt. Cummings.* That Lt. Cummings was the officer in charge of the State Police surveillance conducted at 101-109 State Street on the evening of December 20, 1978.

1. That Lt. Cummings established surveillance headquarters at the offices of First Security Services, located on the 4th floor of 92 State Street directly across the street from the building at 101-109 State Street.

2. That Lt. Cummings assigned the State Police Troopers to the various lookout locations.

3. That Lt. Cummings remained in radio contact with all the State Troopers and directed the activities of the State Troopers throughout the course of the surveillance.

4. That at approximately 10:30 P.M., Lt. Cummings observed an unidentified individual open a window on the second floor of 109 State Street and protrude out the window for several minutes, said second floor being the location where the subsequent fire originated.

B. *Trooper Jarrett.* That Trooper Jarrett conducted a surveillance of 101-109 State Street during the early afternoon on December 20, 1978. That he observed the Bensons at 101-109 State Street during that time period, and that he particularly saw them on the second floor above the Camera Shop, the location of the origin of the subsequent fire that evening.

C. *Sgt. Joyce, Trooper Flagherty and Trooper O'Brian.*

1. That Sgt. Joyce, Trooper Flagherty and Trooper O'Brian conducted a surveillance of 101-109 State Street from a vacant restaurant located on Doane Street, directly behind the Groom Stationary Building.

These State Police Officers will testify that Viktor and Albert Benson drove down Doane Street at approximately 9:35 P.M. and parked their automobile behind 101-109 State Street.

2. That after several minutes Viktor Benson exited the car and walked down Doane Street and turned left onto Broad Street.

3. Viktor Benson was carrying a cardboard box and several pieces of wood straplings.

4. That approximately 5 minutes later Albert Benson exited the car and he also walked down Doane Street to Broad Street. Albert Benson carried a cardboard box in which a white bucket protruded.

5. That at approximately 11:05 P.M. these three officers approached Viktor Benson as he returned to his car and placed him under arrest.

6. Trooper Flagherty subsequently took Viktor Benson's trousers and his handkerchief, both of which had blood on them, for subsequent chemical analysis of the contents contained therein.

7. Sgt. Joyce subsequently obtained a search warrent to search the automobile that Viktor and Albert Benson drove to Doane Street that evening. Subsequent search produced a pair of gloves that the State Police also subsequently had chemically analyzed.

D. *Trooper Dorn and Trooper McDonough.*

1. Trooper Dorn and McDonough were in separate unmarked State Police cars on Broad Street facing State Street.

2. During their surveillance these officers saw Viktor and Albert Benson separately come around Doane Street, up Broad Street and over to State Street where they subsequently entered the building. That at a later time they observed Albert Benson reappear on Broad Street with a white bucket.

3. That Trooper Dorn followed Albert Benson and after Albert Benson had deposited the white bucket on a pile of trash Trooper Dorn recovered said bucket for subsequent chemical analysis.

4. That Trooper McDonough subsequently helped Corporal Saccardo arrest Albert Benson on the corner of State and Kilby Street.

5. That Trooper Dorn subsequently entered the building after the fire, smelt a strong chemical odor, and took samples of the carpeting from the second floor where the fire originated for subsequent chemical analysis.

E. *Surveillance conducted from headquarters at 92 State Street.*

1. Lt. Cummings, Trooper White and other persons were at the 4th floor of 92 State Street observing the front of 101-109 State Street.

2. Trooper White, after the Bensons entered the building at 109 State Street, assumed a position out in front of 92 State Street.

3. That Trooper White observed Albert Benson exit the building with the white bucket and go down Broad Street and reappear on State Street a few minutes later where Albert Benson stood outside of 101-109 State Street.

4. Trooper White subsequently assisted in the arrest of Albert Benson on the corner of Kilby and State Street.

5. That Trooper White subsequently entered the building and smelled a strong chemical odor and observed a lot of trash and straw baskets scattered around on the stairways.

6. That other officers watching the building from the 4th floor of 92 State Street observed people on the 3rd floor of 105 and 109 State Street on the evening of December 20, 1978.

These people were identified as Bill Currin, the operator of a print shop located on the 3rd floor of 105 State Street, and three individuals working for Pavo Real Company located on the 3rd floor of 109 State Street.

7. That the people from Pavo Real left the building several times to visit their store at Quincy Market but were in the building at the time of the fire.

8. That Bill Curren left his shop at approximately 10:00 P.M. and left the building.

9. That the State Police Officers did not observe any other activity within the building during that evening other than Lt. Cummings observation of a person at a second story floor window at approximately 10:35 P.M.

10. That after the Bensons left the building, Lt. Cummings requested Chief McCarthy, who was also on the 4th floor office, to strike the alarm for the fire apparatus.

11. That within five minutes after the time Viktor Benson exited the building a fire erupted on the 2nd floor of 109 State Street.

F. *Corporal Saccardo.*

1. That Corporal Saccardo was in a State Police car located on Kilby Street, near the corner of Doane Street.

2. That he arrested Albert Benson on the corner of State Street and Kilby Street.

II. *Expert Testimony Relating to the Cause of the Fire*

1. Deputy Chief John O'Mara and Chief McCarthy will testify that in their opinion the fire that erupted at approximately 11:00 P.M. in an office on the second floor of 109 State Street was of an incendiary origin. They will base their testimony on samples taken from the scene, two pieces of carpeting and wood straplings, and the denatured alcohol flammable fluid that was found present in the carpeting after analysis by the State Police Chemist.

III. *Anticipated Testimony of various tenants located in 101-109 State Street.*

A. *Mary Marrone*

1. That she is the owner of the Smoke Shop located on the first floor of 105 State Street.

2. That she was not present at State Street on the evening of December 20, 1978.

3. That she has a lease for the premises occupied at State Street by the Smoke Shop.

4. That Thomas Groom & Co., during its bankruptcy proceedings, attempted to terminate the lease pursuant to a court order, said motion was denied.

5. That the Smoke Shop lease contains a termination clause in the event of a fire in the building located at 101-109 State Street.

6. That the fire occurred directly above her leased premises.

B. *Ted Brody.*

1. That he is the owner of the Camera Shop located on the first floor of 105 State Street.

2. That he was not present at State Street on the evening of December 20, 1978.

3. That he has a lease for the premises occupied at State Street by the Camera Shop.

4. That Thomas Groom & Co., during its bankruptcy proceedings, attempted to terminate the lease pursuant to a court order, said motion was denied.

5. That the Camera Shop lease contains a termination clause in the event of a fire in the building located at 105 State Street.

6. That the fire occurred directly above his leased premises.

D. *Pavo Real Personnel*

1. That Pavo Real rents space on the third floor of 101-109 State Street which is used for storage purposes.

2. That various employees went to and from 101-109 State Street and the Pavo Real Store at Quincy Market during the evening of December 20, 1978, using an entrance on Doane Street to gain access to 101-109 State Street.

3. That they were not involved in setting the fire on the second floor of 109 State Street on December 20, 1978.

4. That neither of the Bensons entered their third floor facilities on the evening of December 20, 1978.

E. *Thomas Groom & Co. Personnel*

1. Bill Burke, an employee, will testify that on December 20, 1978 he received a telephone call from a Helen Brown informing him that the building at 101-109 State Street was to be burned that evening.

2. That he secured the premises at Groom Stationary on December 20, 1978, and in particular that he secured the bolt lock on the office side of the door located on the second floor of 101-109 State Street that leads into the stairwell on 109 State Street.

3. That the stairways located at 109 State Street, the entry point of the Bensons on December 20, 1978 does not lead into the basement of the building.

4. That he returned to the building with Thomas Groom V, the owner's son, on the evening of December 20, 1978 to turn on the security system after having been informed by the Sentry Security Company that the same was not turned on.

5. That he was not involved in setting the fire at 101-109 State Street on December 20, 1978.

IV. *Evidence Re: Hamilton Realty*

A. *Purchase of Building.*

1. That Harold Brown d/b/a Hamilton Realty was the high bidder in a sale of the building at 101-109 State Street pursuant to a bankruptcy proceeding.

2. The conveyance was scheduled to occur on December 21, 1978.

3. On December 18, 1978, Hamilton Realty insured the building against fire damage for $650,000.00.

4. That the conveyance was continued as a result of the fire on December 20, 1978 until January, 1979.

5. That the building was insured by Thomas Groom for $350,000.00, said policy and the proceeds for the December 20, 1978 fire were assigned to Hamilton Realty at the subsequent conveyance.

B. *Relationship with the Bensons*

1. That Hamilton Realty had hired Benson Construction Company to renovate the building at 101-109 State Street.

2. That a meeting with Hamilton Realty, Albert Benson and Viktor Benson took place a day or two before the fire.

3. That the Bensons were given a new lock and instructed to install the same on the entry way to 109 State Street.

4. That the Bensons have done fire renovation work for Hamilton Realty in the past.

5. That Benson Construction Company has subsequently renovated the building at 101-109 State Street.

V. *Real Estate Evaluation of the Building at 101-109 State Street.*

A. That due to its close proximity to the Quincy Market area, the building at 101-109 State Street is in a major commercial setting.

B. That first floor office space of the commercial building is highly desirable and valued considerably higher than commercial office space on floors above street level.

C. That the premises occupied by the Camera Shop and the Smoke Shop are highly desirable commercial locations.

1. The leases held by the Smoke Shop and Camera Shop prevent any tenant from occupying the entire first floor premises at 101-109 State Street.

2. The termination of the lease held by the Smoke Shop and Camera Shop would be economically beneficial to Hamilton Realty.

VI. *Conclusion.*

A. That the agreement of Albert Benson and Viktor Benson to conspire to commit arson at 101-109 State Street is proven by the following:

1. That the Bensons were in a position to burn the building on December 20, 1978.

2. That the State Police were specifically looking for Albert Benson and Viktor Benson on December 20, 1978 and expected them to set a fire.

3. That a fire of incendiary origin occurred on December 20, 1978 at 101-109 State Street.

4. That the Bensons were seen earlier in the day on the second floor of the building, the point of origin of the subsequent fire.

5. That the fire occurred directly above the premises of the Smoke Shop and the Camera Shop, the two tenants whose leases contained fire termination clauses.

6. That the fire occurred within five minutes after the Bensons left the building.

7. That the Bensons and Hamilton Realty, a company for which they did a lot of work, would gain by a fire at 101-109 State Street.

8. In short, the Bensons set the fire and their surreptitious activities on December 20, 1978 show they must have had a plan and an agreement to set the fire.

Jordan L. Ring.

Then personally appeared Jordan L. Ring and stated that the foregoing statements are based upon information and belief.

_____

John C. Martland, Notary Public

My Commission Expires: May 11, 1986

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS: SUPERIOR COURT
DEPARTMENT
CRIMINAL NO. 024292

COMMONWEALTH OF MASSACHUSETTS
Plaintiff

v.

ALBERT B. BENSON
VIKTOR E. BENSON
Defendants

COMMONWEALTH'S TRIAL MEMORANDUM

The Commonwealth's evidence in the trial of the above numbered indictment will generally be as follows:

A building located at 101-109 State Street, Boston was owned by Thomas Groom Inc. In the fall of 1978 the building was sold to Harold Brown as the high bidder in a bankruptcy proceeding. The passing of papers for this conveyance was scheduled to take place on December 21, 1978.

As the result of information received on the morning of December 20, 1978 the State Police commenced a surveilance of the building on State Street. Lt. Cummings assigned Trooper Bill Jarett and Trooper Michael Dorne to watch the building during the afternoon of December 20, 1978. Trooper Jarett will testify that he observed Viktor and Albert Benson at the

State Street location on the afternoon of December 20, 1978. Lt. Cummings will testify that he visited the area at 12:00 p.m. and made arrangements with First Security Services and a landlord of a building on Doone Street to use their facilities during the evening of December 20, 1978 to conduct a surveillance. In addition to the State Police being present Lt. Cummings had contacted Boston Fire Commissioner George Paul who designated Deputy Chief John McCarthy to work with the State Police on the liaison to the fire department. Deputy Chief McCarthy was present at State Street throughout the evening of December 20, 1978.

Various state police officers will testify that Viktor and Albert Benson drove down Doane Street (9:35 p.m.) and parked their automobile behind 101-109 State Street. After several minutes Viktor Benson exited the car and walked around to 109 State Street and entered the building. Approximately five minutes later Albert Benson exited the car and he also walked to 109 State Street and entered the building. Viktor Benson carried a cardboard box and several pieces of wood strapping. Albert Benson also carried a cardboard box from which a bucket protruded.

From 7:00 p.m. to 11:05 p.m. the State Police watched the building from the 4th floor of 92 State Street. They observed Bill Curren in his print shop on the 3rd floor of 105 State Street. He left his shop at approximately 10:00 p.m. On the 3rd floor of 109 State Street were three individuals working for Pavo Real unpacking goods delivered to the building that day. They left the building several times to visit their shop at Quincy Market but were in the building at the time of the fire. At approximately 11:10 p.m. they were escorted by Ken Dorch of First Security Services to 92 State Street where they were interviewed. At approximately 10:30 p.m. an unidentified individual opened a window on the 2nd floor of 109 State Street and protruded out the window for several minutes. The State

Police did not observe any other activity in the building during that evening.

At approximately 11:00 p.m. Albert Benson exited 109 State Street carrying a white bucket. He walked south on Broad Street and deposited the bucket in a pile of trash. He then walked to 92 State Street (opposite 101-109 State Street) where he could observe the building opposite him. At approximately 11:04 p.m. Viktor Benson exited the building and returned to the automobile on Doane Street. Albert Benson walked toward Kilby (north and away from Viktor). At this time Lt. Cummings requested Chief McCarthy to strike the alarm for the fire apparatus and he also ordered the State Troopers to apprehend Viktor and Albert Benson.

Sergeant Joyce, Troopers Flaherty and O'Brien approached Viktor Benson at the automobile. Trooper O'Brien patted Viktor Benson down. In a subsequent search the police discovered the following on Viktor Benson:

A. 44 Magnum handgun,
B. 2 books of matches and a Cricket lighter,
C. a screwdriver, and
D. a jack-knife and a utility knife.

The officers escorted Viktor Benson to the 4th floor of 92 State Street.

Corporal Saccardo placed Albert Benson under arrest at the corner of State Street and Kilby Street. Albert Benson was frisked and then searched. He was carrying a .38 caliber Smith-Wesson revolver. Albert Benson was then escorted to the 4th floor of 92 State Street.

The fire apparatus arrived at State Street at approximately 11:07 p.m. At approximately 11:10 p.m. a fire erupted in an office on the second floor. The fire department extinguished the fire and conducted an investigation of the scene. In the

opinion of Deputy Chief John O'Mara the cause of the fire was incendiary. Samples from the scene (two pieces of carpeting) were sent to the State Chemist for examination which revealed a flammable fluid (denatured alcohol).

A day or so before the fire, Viktor and Albert Benson met with Harold Brown and discussed the building at 101-109 State Street. On December 18, 1978, Hamilton Realty (Harold Brown, D.B.A.) insured the building against fire damage for $650,000. The building was also insured by Thomas Groom for $350,000 (Quincy Mutual Insurance Company). That policy was assigned to Harold Brown after the property was conveyed.

There were five tenants in the building. The two tenants on the first floor (the Smoke Shop and the Camera Store) were the only tenants who had leases. The leases extend to 1983 and 1987, respectively, at the tenants option and neither tenant wished to terminate their lease. Pursuant to a clause in the leases, a fire in any part of the building permitted the lessor to terminate the lease. The fire of December 20, 1978 was set in an office on the 2nd floor just above the two stores. The first floor of the building demands the highest rent and the tenants are paying far below the current rental value which has increased rapidly due to the success of the Quincy Market.

The activity of Bill Curren, Terrence Youk, Thomas Brush and James Kornmen (people in the building on the night of the fire) as described by the State Police will be substantiated by the tenants.

Respectfully submitted,

FRANCIS X. BELLOTTI

BY: _____

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COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS. SUPERIOR COURT
DEPARTMENT OF THE
TRIAL COURT
NO. 024292

ALBERT B. BENSON and VIKTOR E. BENSON
Petitioners

vs.

COMMONWEALTH OF MASSACHUSETTS
Respondent

MOTION TO DISMISS

I. *Statement of the Case*

ALBERT B. BENSON and VIKTOR E. BENSON respectfully move this Honorable Court pursuant to Mass. R. Crim. P. 13(c)(1) to dismiss indictment No. 024292, or in the alternative, to grant relief in the nature of prohibition.

ALBERT B. BENSON and VIKTOR E. BENSON, previously acquitted of the substantive charges of arson and breaking and entering with intent to commit arson, state that the doctrine of collateral estoppel, as embodied in the Double Jeopardy clause of the Fifth Amendment to the Constitution of the United States, bars the prosecution of the Defendants for the crime of conspiracy to commit arson, or alternatively, bars the relitigation of all facts and issues that were necessarily determined in their favor at the prior trial.

The Defendants now await trial, presently scheduled for May 17, 1982, on the conspiracy indictment. Yet the Com-

monwealth has no more evidence today of the existence of a conspiracy than that which it introduced during the previous trial of the Defendants on the substantive charges, charges of which they were acquitted. The Defendants maintain, therefore, that the Commonwealth will be unable to meet its threshold burden of proof for the crime of conspiracy to commit arson without again attempting to prove that the Defendants committed the substantive crimes of arson and breaking and entering with the intent to commit arson. To grant the Commonwealth an opportunity to relitigate the attendant facts and issues, in an effort to discover the right combination of convincing evidence and willing jurors to produce a conviction, thereby putting the Defendants twice in jeopardy, violates the fundamental rights secured to them by the Fifth and Fourteenth Amendments to the United States Constitution.

In support of the within Motion, Albert B. Benson and Viktor E. Benson state that:

1. On January 11, 1979, the Suffolk County Grand Jury indicted Albert B. Benson and Viktor E. Benson, the Defendants herein, on identical indictments for the offenses of arson (Indictment Nos. 024294 and 024296), breaking and entering with the intent to commit a felony, to wit: arson (Indictment Nos. 024293 and 024295) and conspiracy to commit arson (Indictment No. 024292).

2. Indictment No. 024292 alleged, in material part, that:

> "VIKTOR E. BENSON, ALBERT B. BENSON
>
> On December 20, 1978, and on diverse other dates, did conspire together to willfully and maliciously cause a building to be burned, and did conspire together to aid, counsel, and procure the burning of a building situated at 101-109 State Street, Boston. . ." (App. 40).

3. Indictment Nos. 024294 and 024296 alleged, in material part, that Viktor E. Benson and Albert E. Benson respectively:

> "On December 20, 1978, did willfully and maliciously cause to be burned, and did aid, counsel and procure the burning of a building situated at 101-109 State Street, Boston. . ." (App. 41).

4. Indictment Nos. 024293 and 024295 alleged, in material part, that Viktor E. Benson and Albert B. Benson respectively:

> "On December 20, 1978, did break and enter in the nighttime the building of Thomas Groom and Co., Inc., situated at 101-109 State Street in Boston, with the intent to commit a felony, to wit: arson." (App. 43).

5. On September 11, 1979, a trial was commenced in Suffolk Superior Court before Sullivan, J., and a jury on Indictment Nos. 024293, 024294, 024295 and 024296 against the Defendants, Albert B. Benson and Viktor E. Benson.

6. On September 18, 1979, the jury returned verdicts of *not guilty* on Indictment Nos. 024293, 024294, 024295 and 024296.

7. Prior to said trial, numerous pre-trial motions and other pleadings were filed with the Court.

8. On or about February 14, 1979, counsel for the Defendants, Albert B. Benson and Viktor E. Benson, filed a motion for a Bill of Particulars as to Indictment No. 024292. (App. 45).

9. Said Motion, at Paragraph 4, inquired of the Commonwealth:

> "Whether or not there were any co-conspirators who were not indicted. If the answer to the foregoing is in the affirmative, the name and address of each such unindicted co-conspirator;" (App. 47).

The Commonwealth responded as follows:

> "4. The Commonwealth is unable to specify the names of any other co-conspirators at this time." (App. 50).

10. On March 15, 1979, counsel for the Defendants and counsel for the Commonwealth (Assistant Attorney General John J. Bonistalli, Esquire) met at a pre-trial conference in Suffolk Superior Court. By the terms of a Pre-Trial Conference Stipulation entered into that day, the Commonwealth represented the following with respect to Defendants' Motion for a Bill of Particulars as to the conspiracy indictment:

> "A. Mr. Bonistalli said there is no direct evidence pertaining to diverse other times; and that the Commonwealth will only rely on inference to prove said meeting.
>
> B. The Commonwealth has no statements to support the allegations contained in Paragraph 3 relating to an agreement to commit arson.
>
> C. The Commonwealth has no direct evidence relating to a conspiracy, but if such evidence is discovered, Mr. Bonistalli will so inform defense counsel." (App. 53).

11. The Commonwealth has continually acknowledged, through its responses to various motions, that it has *no* direct evidence of a conspiracy; furthermore, as of this date, the Commonwealth has neither informed defense counsel of the existence of any direct evidence nor supplemented its pleadings to indicate such.

12. Following their acquittal of the substantive charges on September 18, 1979, the Defendants filed a Motion to Dismiss Indictment No. 024292, based upon double jeopardy and collateral estoppel principles. During argument on the collateral

estoppel issue before the Suffolk County Superior Court (Hayer, J.), Mr. John J. Bonistalli, Assistant Attorney General, told the Court that there was *additional* evidence that would be introduced at the trial on Indictment No. 024292, and that the trial of said conspiracy indictment would *not* be based on the same evidence as was introduced by the Commonwealth during the trial on the substantive offenses of arson and breaking and entering with intent to commit a felony, to wit: arson.

13. On December 26, 1979, Judge Hayer filed a written *Memorandum and Order* denying the Defendants' Motion to Dismiss Indictment No. 024292. (App. 59). The Court, in rejecting the Defendants' collateral estoppel argument, specifically referred to the representation of Mr. Bonistalli, stating:

> "At this time posture what evidence will be presented by the Commonwealth in the conspiracy trial is not known. While the Defendants say it will be the same evidence that was heard in the substantive trial, the Commonwealth does not agree that it is so." (App. 67).

14. On March 14, 1980, Mr. Bonistalli forwarded to the Defendants' counsel copies of various governmental reports relating to arson investigations at 162 Naples Road, Brookline, Massachusetts; MacArthur Boulevard, Bourne, Massachusetts; and 502-508 Oak Street, Brockton, Massachusetts. The reports concerned fires that had occurred at these locations during the period of time from May, 1975 to January, 1976. Mr. Bonistalli told Defendants' counsel that at the trial of Indictment No. 024292, the Commonwealth would introduce evidence of these three fires and the alleged involvement of the Defendants therein in order to show a "common scheme" by the Defendants to conspire to commit arson.

15. On March 24, 1980, the Defendants filed their Motion in Limine - III, seeking to preclude the Commonwealth at the conspiracy trial from introducing into evidence and from making any reference to the three fires at Brookline, Bourne and Brockton and the alleged involvement of the Defendants therein. (App. 70).

16. On April 14, 1980, a pre-trial hearing was held on Defendants' Motion in Limine - III and on the issue of the admissibility of evidence of other crimes, specifically the alleged involvement of the Defendants in the fires at Brookline, Bourne and Brockton.

17. On April 15, 1980, the Court (O'Neil, J.) issued an Order precluding the Commonwealth from introducing evidence of the fires in Brookline, Bourne and Brockton as part of its case-in-chief during the conspiracy trial. (App. 80).

18. As of this date, the Commonwealth has not informed Defendants' counsel of any additional evidence of a conspiracy. The Commonwealth has told defense counsel that it intends to introduce new evidence relating to (1) the alleged motive of the Defendants to set the fire; (2) the activities of other persons in the building on the evening of December 20, 1978; and (3) the fact that the Defendants were armed at the time of their arrest.

Such evidence, however, does not even arguably suggest the existence of an agreement by the Defendants to commit arson; rather, it focuses on whether or not the Defendants committed the substantive crime of arson, an issue previously decided against the Commonwealth in the prior trial.

19. The Commonwealth, then, is attempting to prosecute Indictment No. 024292, alleging a conspiracy to commit arson, by relitigating the very facts determined against it by the acquittal of the Defendants on the substantive charges of arson and breaking and entering with intent to commit a felony, to wit: arson.

20. On March 20, 1980, the Defendants filed their Motion in Limine - I, seeking to bar the Commonwealth from relitigating all facts and issues necessarily determined against it by the acquittal of the Defendants on the substantive charges. (App. 87).

21. In addition, on April 13, 1980, in response to the Order of the Court (O'Neil, J.) which precluded the Commonwealth from introducing evidence of the fires at Bourne, Brookline and Brockton, and the alleged involvement of the Defendants therein, the Defendants filed their Motion to Dismiss - IV, in which they sought to dismiss the conspiracy indictment altogether on the grounds of collateral estoppel.

22. On May 14, 1980, at the Court's request, the Commonwealth filed a *Trial Memorandum*. (App. 100). By agreement between the Commonwealth and counsel for the Defendants, the Court (O'Neil, J.) treated the *Trial Memorandum* as a summary of the nature of the testimony to which the Commonwealth would refer in its opening remarks to the jury, and in turn, as being a summary of the proposed evidence to be introduced by the Commonwealth at the conspiracy trial.

23. Prior to the hearing on the Defendants' Motion in Limine - I, Jordan L. Ring, Esquire, counsel of record for Albert B. Benson, filed an Affidavit in Support of Motion in Limine - I. (App. 105). Insofar as the Affidavit of Mr. Ring was consistent with the Commonwealth's Trial Memorandum, the Court treated it as a more precise recitation of the proposed testimony of the Commonwealth's witnesses.

24. After hearing argument on the collateral estoppel issues on April 29, 1980, the Court (O'Neil, J.), on June 23, 1980, denied the Defendants' Motion in Limine - I and Motion to Dismiss - IV. (App. 120).

25. The defendants then filed an Application for leave to File an Interlocutory Appeal pursuant to Mass. R. Crim. P. 15(b)(2) in the Supreme Judicial Court (App. 124).

26. On October 3, 1980, after a hearing before a Single Justice (Kaplan, J.), the Application was denied without prejudice to the Defendants' right to renew their contentions during the course of the trial proceedings. (App. 211).

27. On January 24, 1981, the Defendants filed a two-count Complaint in the United States District Court for the District of Massachusetts. (App. 4). Count I was a Petition for a Writ of Habeas Corpus pursuant to 28 U.S.C. Sections 2241 and 2254, and Count II consisted of a Complaint for Declaratory and Injunctive Relief pursuant to 42 U.S.C. Section 1983 and 28 U.S.C. Section 1343(3). Therein, the Defendants sought to redress the deprivation under color of state law of their rights secured by the United States Constitution. Both Count I and Count II were founded upon the principle of collateral estoppel, as embodied in the Double Jeopardy clause of the Fifth Amendment to the United States Constitution and made applicable to the states through the Fourteenth Amendment.

28. After a hearing before Garrity, J., the Petition was denied on February 26, 1981 (App. 215). In its Memorandum of Decision, however, the Court declared that the Commonwealth ". . .will be foreclosed (at the trial of the conspiracy indictment) from claiming or arguing that the Petitioners set the fire in the building." (App. 219).

29. Thereafter, the Defendants filed a Motion for Reconsideration and Clarification of the District Court's decision (App. 221). On March 6, 1981, the District Court (Garrity, J.) issued an Order amending the previous decision so as to preclude the Commonwealth at the conspiracy trial from claiming or arguing in any way that the Defendants set the fire in the building or that they did *aid*, *counsel* or *procure* the burning of the building. (App. 237).

30. On March 6, 1981, a Certificate of Probable Cause was issued by the District Court pursuant to 28 U.S.C. Section 2253, Rule 22 of the Federal Rules of Appellate Procedure and

Rule 17 (Habeas Corpus) of the Rules of the United States Court of Appeals for the First Circuit, and the action was appealed to the United States Court of Appeals for the First Circuit (App. 234, 239).

31. On November 9, 1981, the Court of Appeals rendered a decision in which the judgment of the District Court was vacated in part and affirmed in part. (App. 240). Therein, the Court (Coffin, C.J.) stated in pertinent part:

> There can be no question here that the application for leave to file a petition for interlocutory appeal did not raise precisely the same issue presented in this petition for a writ of habeas corpus. Despite the wording of the Massachusetts Rules of Criminal Procedure, which explicitly recognize interlocutory appeal only for decisions on suppression motions, appellants could — and still can — appeal to the Massachusetts Supreme Judicial Court under its supervisory power. See Mass. Gen. Laws Ch. 211 s. 3; *Fadden v. Commonwealth*, 382 N.E. 2d 1054, 1056 (Mass. 1978). We therefore find that the unusual circumstances justifying jurisdiction over a pre-trial petition for a writ of habeas corpus do not exist in this instance.

32. On May 14, 1982, a hearing was held before the Single Justice of the Supreme Judicial Court (Abrams, J.) on Defendants' Petition for Review by the Full Court pursuant to M.G.L. C. 211, S. 3. The Single Justice, (Abrams, J.) suggested to counsel that a more appropriate avenue for relief would be for Defendants to file a Motion to Dismiss with the Trial Judge [pursuant to the Order dated October 3, 1980, (App. 211) by the Single Justice (Kaplan, J.)] and a Motion to Reserve and Report the Motion to the Supreme Judicial Court.

33. The Single Justice (Abrams, J.) stated the impanelment of the jury on Indictment No. 024292 would be stayed pending

action on these matters by the Superior Court Trial Judge (Lynch, Ch. J.). A certified, sealed copy of the tape of the hearing held before the Single Justice of the Supreme Judicial Court was submitted to the Superior Court with the filing of the within Motion.

WHEREFORE, Albert B. Benson and Viktor E. Benson move this Honorable Court pursuant to Mass. R. Crim. P. 13(c)(1) to dismiss Indictment No. 024292 or, in the alternative, barring the relitigation at the conspiracy trial of those facts and issues that were necessarily determined in favor of the Defendants by their previous acquittal of the substantive charges of arson and breaking and entering with the intent to commit arson.

Respectfully submitted,

VIKTOR E. BENSON
By his Attorney,

/s/_____
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ALBERT B. BENSON
By his Attorney,

/s/_____
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June 1, 1982

THE COURT: What's the Commonwealth's case going to consist of? What would your opening be, in substance, to the jury, assuming that you are precluded from contending that either of these defendants actually participated in setting the fire or procured or hired or contacted anybody to do it?

MR. BONISTALLI: Your Honor, the government's evidence would be that the property, prior to December 20th of 1978, had gone through a bankruptcy proceeding and was purchased by Harold Brown of the Boston area, who was involved in real estate; that he purchased the property and that the Bensons were employed by Brown; and subsequent to taking over the property, the Benson's were employed to rehabilitate that property: do some structural work, construction work on the property; that Mr. Brown insured the property on December 18th for some $650,000; that the property was located in the area of Quincy Market, or just outside of Quincy Market; and at that time, 1978, early 1978, property values in that area were rising; that the first two stores — the first floor stores in that building, a camera shop and a cigar shop, had a long term lease; and in the lease, a clause of the lease was that any structural damage as a result of fire terminates the lease. An expert will testify that the value of those leases — the rental value was grossly under the market value if it was to be rented at the time of the fire; that the defendants, Viktor and Albert Benson, met with Harold Brown a day or so before the fire; that they were given a key to the property; and the — they arrived at the scene that evening and were apprehended and arrested.

The insurance was — subsequent to the fire, the day after the fire, was attempted to be cancelled. A phone call was made to the insurance broker requesting that the effective date of the insurance, December 18th, be changed or amended to some time after the fire, arguably demonstrating some type

of consciousness of guilt on behalf of the people involved in insuring the property. And then coupled with the defendants presence at the building at the time of the fire, Your Honor, the Commonwealth would argue by inference that the defendants were engaged, or had agreed upon setting the fire at 109 State Street.

And I think the question of the — obviously the fire itself, the Commonwealth would move to introduce that evidence. It was intentionally set; and would request the Court to give an instruction to the jury that the evidence is being offered for a limited purpose and that the jury is not to use it as a basis of determining — or not — even in terms of informing the jury that the defendants had previously been acquitted and therefore, they could not engage in any speculation with respect to whether or not the defendants had set the fire. They could merely use that evidence as it assisted them in making a determination as to whether or not the defendants had engaged in a conspiracy or an agreement to set the fire by virtue of using that information to demonstrate some knowledge on their part that the fire did take place; and that the fire — and that they knew it was going to take place that evening, Your Honor. That, in summary, would be the Commonwealth's evidence.

THE COURT: You've answered my question. You can continue on arguing if you would.

CERTIFICATE

This is to certify that the foregoing, pages 1 through 3, is a true and accurate record of my dictated tape voice recordings of a portion of the transcript in the matter of Commonwealth vs. Albert Benson and Viktor Benson, Suffolk Superior Court Criminal Action No. 024292, heard at Boston on June 1, 1982, before Lynch, CJ.

/s/_____

Patricia Bellusci

MASS. GENERAL LAWS

Chapter 278

Section 2A - Separate trials for commission of offense and conspiracy to commit such offense

An indictment for conspiracy to commit a substantive offence shall not be tried simultaneously with an indictment for the commission of said substantive offence.

G.L. c. 278, s. 2A repealed by St. 1979, c. 344, s. 43

Mass. R. Crim. P. 9 (e)

(e) CONSPIRACY. An indictment or complaint for conspiracy to commit a substantive offense shall not be tried simultaneously with an indictment or complaint for the commission of the substantive offense, unless the defendant moves for joinder of such charges pursuant to subdivision (a) of this rule.

378 Mass. 859 (1979)

FINAL ARGUMENT BY MR. BONISTALLI:

MR. BONISTALLI: Mr. Ring, Mr. Reiser, ladies and gentlemen: I would like to thank you very much for your attention over the past week. You have been very alert and I thank you for that attention and your patience during the course of the last seven days.

As I indicated to you in my opening statement that your role during the period of time in which the evidence was going to be introduced would be a passive role and I think you all agree it has been that. And you will come to find after my argument and after the Judge instructs you on the law that your role will become that of a very active role, and it will be your role to decide the facts of the case.

Now, when I made my opening to you I made certain representations to you. I told you what I would produce, I told you what witnesses I would call, I told you what evidence would be proved by the Commonwealth.

At this time I would just like to take an opportunity to review that evidence and review what I represented to you and what was proved. And how the police arrived at that area, how Lieutenant Cummings was at the property and at the area at approximately twelve o'clock that day with Sergeant Joyce.

Trooper Dorn testified that he was at the building at approximately 3:00 p.m. and the other officers arrived at approximately 5:30 to 6:30; that they were there and they were watching the building at 109 State Street, 101 to 109 State Street. And I indicated in my opening that I would prove to you that this fire was set.

Let's just go to that issue for a second now. One of the indictments charge both of the defendants with setting the property on fire. One of the elements was that the fire was set, that it was caused, intentionally set. Think of the testimony in

that regard and think of my representations to you in the opening and I told you about the people that the Commonwealth would call. John O'Mara, 38 years in the fire department; John McCarthy, 38 years in the fire department. Hundreds and hundreds of fires they examine in the past years that they were District Chief or Deputy Chief. They came in and told you what they observed. How they were standing out on the street and John McCarthy saw the fire erupt, saw it flare. He told you in his opinion it was a set fire based on that observation and how it spread through the room. John McCarthy and John O'Mara told you about the odor, the strong odor you smelled in the bottle that was removed from the rug in the office.

The troopers testified as to the odor. Then the witnesses, O'Mara and McCarthy with their collective years of experience, approximately 78 years of experience, testify as to their opinion as to the cause of the fire and they told you that the fire was set and Chief McCarthy and Chief O'Mara said there was no doubt in their mind and then they went on and gave you the basis of it, the odor, the type of fire that they observed, the flash, the pattern of the fire. The low burn on the wall, low burn on the cabinets, the burning on the carpeting. And you recall how cross-examination tried to discredit them, tried to go through the fact about three different points of origin or the size of the room or what they observed or didn't observe.

Well, that was an issue at that time but you didn't hear them argue that very strongly in their closing argument because I think for the most part there is very real doubt that that fire was set by somebody. It's your job to find out who set that fire. And again in my opening I told you about the facts that I would present and that we presented that two people arrived at the street behind 101-109 State Street. And that they arrived at 9:39 approximately. And that three state police officers sat in a vacant restaurant maybe twenty feet or so from

the position of that car from the other side of the street identified those people. And recall how it all happened, I think there is very little dispute about that, ladies and gentlemen. The driver of the car exits the car. He is carrying a box with some sticks in it. He leaves the other person in the car. He goes onto State Street and he enters the building and Trooper White testified how he entered the building. He looked to his right and his left. And later on Trooper Saccardo testified Mr. Albert Benson looked to his right and left when he was up on the top of Kilby Street. You didn't hear any cross-examination with respect to that. Five minutes later, the second person leaves the car carrying a box with sticks. You heard Trooper Flaherty testify as to how he was carrying the box, he was carrying his hands below the box. You have seen the defendant Albert Benson, you have seen him stand up. You have heard him described as approximately six-four, two hundred pounds. If it weighed forty pounds or fifty pounds, do you think he would have a lot of problems carrying that box. Do you think Sergeant Joyce was concerned about or thought about how he was carrying that box at the time when he was cross-examined?

And when he was recross-examined on Monday, he told you that he spoke to me, he wasn't trying to hide anything from you. He told you he had now remembered how he was carrying the box.

In any event, think of their arrival, think of how they entered the building separately. Was that typical of someone going in to do some kind of construction work or do some planning and had some other concern about the building. How he walked around the corner and entered the building and let his brother in. Or was that consistent with someone who didn't want to be noticed, didn't want to go in with a plan to burn the building.

Then the second person left the automobile three or six minutes later. And he was carrying the box with another bucket in it, a perfectly good bucket from all appearances, still could be used at this point if you put the top on as it was found.

Was this consistent with him going in to help his brother to do some construction work, consistent with them doing some work in the building, some plumbing? Is it consistent with a construction worker or consistent with somebody going to set fire to a building, somebody who had a plan to set fire to a building.

Now, think of their conduct when they enter the building. They arrive at the area of the building. Both are in the building at approximately 9:40, 9:45, in that vicinity.

Now, you heard Mr. Burke testify and you have seen pictures and you will take those pictures with you of that door where they entered. The only place they could go was to the second floor or crawl over those baskets up to the third or fourth floor. There was absolutely no evidence at all, no evidence at all of any noise or any activity in that building after their arrival. No evidence of any lights going on on the second floor. No evidence of any lights or additional people arriving on the third floor with the people from Pablo or the sprinkler. No evidence of any lights or activities going on on the fourth floor. No evidence of activity in terms of lights or people arriving on the fifth floor. Is that consistent with somebody going into the building to do some construction work, to find out what work they had to do. Or was that consistent with somebody going into the building that didn't want to be detected who had a plan to burn the building.

The defense suggests to you that the Commonwealth or the Government or the police were overreaching. Well, keep in mind when they say they are overreaching that they do observe somebody in the second floor area just adjacent to the

room where the fire occurred. And keep in mind that they spoke to you about that and keep in mind that they had binoculars and a good line of viewing. Keep in mind if they were trying to get Viktor and Albert Benson this would identify that person. They suggested to you they got on the stand and overreached and distorted the truth. Keep in mind they could have identified those people if that's what their purpose was. Their role in the investigation was just to be in that area and to protect that building. Their role on the witness stand was to relate to you as jurors, as finders of fact what they observed that night. And I don't think from the way they testified and I don't think you will find from the way they testified that they did anything but just tell you what their best memory of the facts were, what they heard, what they observed, what they did.

Going on with the facts. Eleven o'clock, very little dispute or doubt about that time. One of the individuals leaves the building and with him he is carrying the bucket. Now, recall it was Albert Benson who exited the building first and was the second individual to enter the building and he had a box. You recall when he left the building he didn't have any box. As a matter of fact, all he had was a bucket, a bucket that seems to me to be perfectly good and seems to you, I submit, perfectly good at this time for some type of storage. They were using it that night for some purpose. What did they do at this time — they disposed of it. Did they leave the building with any boxes? And then he walked down Doane Street — down Broad Street. Does he return to the automobile on Doane Street? There is a dumpster right at Doane Street on the photographs produced by the Commonwealth. Does he put the bucket in the dumpster? No, he goes down and puts it in the middle of a pile of trash. Does he return to the car then to wait for his brother or does he return to State Street?

Within a minute or so he is back on State Street. Does he go back into the building to meet with his brother? He crosses the street and walks up to Merchant's Row on the top of the street at the shoe store. Is that consistent with somebody taking a view of the building he is going to do some remodeling on? Consistent with somebody working in the building or consistent with somebody looking over the area for any activity, any police or any other individuals that might apprehend him or see him in the area.

Does he then return to the car by Kilby Street? He goes back to the front of 101-109 State Street. He stands at 92 State Street. Is that consistent with somebody working at the building in the rain at eleven o'clock after he just spent an hour-and-a-half in the building. Or is it consistent with his standing there so his brother could see him in the window on the second floor so he culd give some type of signal or mark that things were clear so he could set an ignition device or fire.

Is it consistent with a construction worker or consistent with somebody who had a plan to set a fire?

Also, as we stated in my opening statement of proof, Viktor Benson, the second brother, exited at 11:04, the very earliest 11:03, according to Lieutenant Cummings. Does he come out of the building and walk to his brother? Does his brother join him as he walks back to the car or does he take a right on State Street and go back to his automobile? Is he carrying any boxes or any sticks with him? He is empty-handed. Is that consistent with somebody who went with his brother to look over the building to do construction work or is it consistent with somebody who had a plan to burn the building and planning to get away and get back to his automobile.

Then the last act with respect to that evening, one of the last acts with respect to their activity, Albert Benson — does he join his brother? He is at 92 State Street almost directly across the street, maybe twenty feet or thirty feet away. Does he

yell to his brother, does he walk with him back to the automobile? He takes off in a direction opposite of his brother. Is that consistent with somebody going together with his brother, construction workers, good with their hands to remodel the building or is it consistent with somebody who didn't want to be observed together, didn't want to be together, didn't want to be conspicuous? Does he return to the automobile? You heard Officer Saccardo pull up behind him on Kilby Street, observed his activity, observed his conduct, Did he return to the automobile in a casual way? No. He turned and looked back down the street to see what was happening. Is that consistent with somebody just going to the building planning to rehabilitate it or going to the building with plans to set fire to it?

Then, most importantly, Viktor Benson leaves the building at 11:04, 11:03, the testimony varies. Everybody tried to give you their best recollection, their best memory. The time of the fire, a very important point.

You remember Chief McCarthy went through the time it took him to get to the street, went through the time it took him to observe the fire engines arrive on the street, 11:07, ran around the street, Doane Street, 11:08, returned to State Street and he observes the eruption of the fire in that window, 11:09. You recall Chief O'Mara, two or three minutes to get there, 11:07, 11:08. Two or three minutes to set up, 11:09, 11:10. He hears somebody shout fire in the second floor window. 11:10, 11:11. You heard Corporal Saccardo, you heard Trooper White, you heard Lieutenant Cummings, you heard the other testimony of the police officers. Within five minutes after that apprehension, within the period of time it took them to apprehend them at the top of Kilby Street and the back of Doane Street and walk to 92 State Street and take an elevator upstairs, by that time the fire is out and the building is in smoke, within five, six, seven minutes. Can't be very much

doubt as to the time of that fire, 11:09, 11:11, five or seven minutes after Viktor Benson leaves the building. The fire erupts after they left the building, didn't erupt after anybody else left the building. Saw Bill Curran leave, saw somebody else arrive with a package. The fire erupted after those individuals left the building, within minutes after the people left the building.

You heard Mr. Hankard, you heard Chief O'Mara talk about ignition devices, talk about the use of cigarettes and matches. You saw the photographs with respect to the bags that were found on the rug in the area where the alcohol was found. You heard Mr. Hankard talk about the imagination and the list just goes on as to how a fire could be set.

You heard about the disruption and pressure of a hose put in the room after a fire is extinguished with the use of that hose. Just a period of five minutes, ladies and gentlemen, as to when that fire occurred. And keep in mind it occurs just after they left the building.

Just at this point I would like you to examine some of the defendants' theories with respect to this case. They suggest to you in the office that there were no boxes, that there were no sticks.

But you look at the evidence and you recall Mr. Burke's testimony. He said that that motor oil box wasn't there. He said those other cardboard boxes weren't there. The only boxes that were there were the cardboard boxes containing the beer cans. Review those photographs. They said there were no sticks in that office that they had walked in with. Well, there are sticks in two locations in that building. You look at the last exhibit offered, Exhibit 37, the right-hand corner of that office and you will see one of those sticks and you look at the baskets or containers on the stairwell and you will see sticks kept in that bucket.

You remember Mr. Burke testifying there were no boxes in that office. You remember that the defendants Viktor and Albert Benson entered the premises with boxes but neither one of them exited with the boxes. Viktor Benson didn't exit with a stick. Examine that photograph, right-hand corner, Exhibit 37, stick leaning against the wall in an area where there is fire.

Four, five or six entrances on Doane Street, there is four, maybe two that are open. The police were there all evening watching it and my brother seems to put a great deal of weight to the fact they didn't apprehend the people who arrive at seven o'clock with a package from Bay State Glass. They didn't apprehend other people. Are they going to announce their position there, ladies and gentlemen? Do they want other people in the area to know what is going on? This seems to hold a great deal of weight to the fact they didn't apprehend them going into the building. That the police didn't stop and pick up Albert and Viktor Benson as they were going in the building. What would happen then? Is there some concern with some type of a pail, they were going in to paint the building or do some type of repair that they try to offer at this time. Is that appropriate to do by the police. They seem to put some significance or importance to the fact that the building wasn't occupied by police. They're very capable and experienced attorneys. They are well versed in the Fourth Amendment. They are well versed in the police's rights to enter the building. What are they going to break into buildings for? Supposedly they arrive in working clothes. Well they certainly weren't in jackets and ties. And the fact they weren't in disguises I am not sure is of much significance. Certainly if they wanted to be there and wanted to be unnoticed, if they walk around in some clown costumes they would be very obvious to people in the vicinity.

Why are they going to walk around with disguises at that time? Do you think they expect to be apprehended? Do they

expect people to be there watching them? Do you think they expected that they needed disguises?

The testimony of the witnesses, ladies and gentlemen, you are to equally weigh the credibility, their trustworthyness, what you find and what you don't find. That is their credibility. It doesn't really go to guilt or innocence. It plays a role in what facts you find. It plays a role in what facts you apply to the law. But don't let the facts be misrepresented to you.

For example, the fact that one of the police officers supposedly suggested to the jury that these baskets on the stairwell were an accelerant. Well, your recollection controls but that question was asked by my brother Mr. Ring of Trooper White don't you think that would burn very well and Mr. White said I think in the ordinary course keeping in mind he is not a fire expert, keeping in mind his job is not to put out fires or examine fires. Was he trying to overreach and hook the defendants? Trying to say this was set up to burn the building? Was that what he was doing or was that suggested by my brothers? Was this overreaching or was he testifying to what he was asked. If it was overreaching I suppose I could have asked him.

They indicated to you that the bag that the pants were found in was air tight. Trooper Flaherty testified that bag was not air tight. Mr. Hankard testified he had no recollection of how he received it. Trooper Flaherty also testified that he took the pants off to be examined for blood. It was on cross-examination, very very well done by Mr. Ring that he also got him to admit that an examination for alcohol was done. That isn't why the pants were taken. There was no odor of alcohol, no finding of alcohol on the pants. Examine those pants. Ask yourselves if these corduroy pants are working pants or were they pants he was going into that building wearing just on the night he had planned to burn a building as opposed to working on the property. He had a cut on his leg.

He had to tie it with a handkerchief. It must have been a serious cut, he was leaving with his brother to aide him to go to the hospital to have that cut examined. Was that cut consistent with maybe somebody crawling through a window above a door catching on a sash of some kind or using some type of instrument to jimmy open a door? My brothers have suggested to you motive and what is the motive. Well, you listen very carefully as I am sure you will to the judge's instructions and you will hear that the Commonwealth has actually no burden with respect to motive. It's not part of the Commonwealth's case or any part of the elements of the charges set forth against the defendants. How do you prove motive in any event? How do you really know why somebody does something? You crawl into my mind and reach into their minds to find out. Mr. Reiser indicated that a professional arsonist wouldn't set a fire under a sprinkler head. But we haven't represented in any form to you, ladies and gentlemen, that these people are professional arsonists, we don't represent or view their ability as arsonists. And we haven't proved or attempted to prove motive. It could be any one of a number of things. They are working on a building, you saw their business cards —

. . . . . .

MR. BONISTALLI: You have examined the business card that was introduced, you have read what their specialty is, what their business is, rehabilitating buildings, fire work. Well, it was the wintertime, ladies and gentlemen, and doesn't the contract business slow down in the wintertime? Don't they need to work inside? I am not suggesting that we have the answers to that but I am also telling you that we don't have any burden with respect to that. And the judge will instruct you in that regard.

My brothers seem to place a great deal of weight on the fact that their clients were very concerned and conscious about the parking restriction on State Street. Throughout the course of the trial I believe the impression was left that they were parking legally and today we hear that they were parking in a tow zone. Well, you examine the exhibits introduced with respect to Doane Street and you will see they were parking illegally in that area too.

What happened to their concern about parking legally, their concern about the restriction of the city of Boston? Other areas my brothers mentioned some concern about that may be of some significance to you are the gloves, explained easy enough by Hankard. The gloves were retrieved as Sergeant Joyce testified the second day, well after the fire in an automobile, not wrapped in any way, with a search warrant. Mr. Hankard told you the conditions under which he received them, six days after the fire in a brown paper bag. He told you about the physical characteristics of alcohol, the nature of alcohol, how it evaporates. They indicated some importance in the bucket, the fact there was no alcohol in there. Again, keep in mind in the Commonwealth overreaching case. If they were overreaching to get the defendants wouldn't Trooper Michael Dorn testify that he observed and smelled alcohol or some type of fluid in there? Wouldn't that be easy enough? Wouldn't he come on and tell you what he honestly and truthfully believed he recalled and remembered. Didn't he tell you that he didn't smell anything and that he carried it in the open air, and stored it in an automobile and then the open air and carried it in the rain. And did Mr. Hankard testify that the property of that bucket being plastic, it wouldn't absorb some type of flammable liquid or fluid.

As a matter of fact, that's what those fluids are contained in because it doesn't absorb it and as a matter of fact the bucket was kept and contained in a room in his lab where the

heat was 70, 72 or so in the wintertime and that the nature of alcohol and the property would cause that to evaporate.

With respect to the other people in the building, Mr. Curran was observed leaving the building at about 10:10. Lieutenant Cummings saw him leave. Trooper Mike Flaherty saw him leave, three other people in the building during the course of the night observed by Lieutenant Cummings.

On the third floor, they left the third floor after the fire, are escorted over to 92 State Street, observed by Trooper Dick White, brought to 92 State Street and interviewed and interviewed later on by Corporal Saccardo and Joyce and Trooper White.

Does it make any sense to you that these people could go down and set a fire below the area that they are working in and then remain in the building?

Let's just go on and examine some of the areas that were brought out in the defendants' cross-examination and their defense in this matter. It started out with the other people in the building, the fact they hadn't been interviewed, hadn't been spoken to. They cross-examined Trooper Flaherty and later on you learn they were spoken to, that they were taken across the street, they were brought to 92 State Street. Later interviewed by Corporal Saccardo, Sergeant Joyce, Trooper White.

They then seem to lay some attention or importance on the fact that the building wasn't thoroughly searched — cross-examined Mike Dorn on it. Later on they relinquished somewhat with regard to that argument after Chief O'Mara testified that the building was thoroughly searched, after Trooper White testified the building was thoroughly searched, after Bill Curran testified the only way out of the building upstairs was not through a skylight but on the fire escape and how hard that was.

At the outset they lay some situation with respect to the fire escapes and how important that was and how that was an opportunity for somebody to get out of the building. Well, you didn't hear much of that after the Fire Department testified they arrived within three to five minutes to that area on Doane Street and they had 20 or 30 people back there and the policemen were back there a couple of minutes. You didn't hear that argument very strongly after awhile when this defense or that theory was cut off.

You heard at the very outset, a very significant point raised to you about alcohol being in that office, about typewriter fluids, about cleaning fluids, about stationery supplies. Well, did you hear any argument about that? Once Trooper White searched the building and once Chief McCarthy went through the building, once Bill Curren testified there were no such things in that office at the time that he cleaned out the cabinets, you didn't hear very much about that. It's a very flexible defense.

MR. REISER: Objection, your Honor.

THE COURT: Overruled.

MR. BONISTALLI: Fingerprints were of great significance with Trooper Flaherty, with Trooper White, with Corporal Saccardo. Once they were explained by Bill Burke as being there by his friend while moving stuff out of the building you didn't hear anything about fingerprints.

Likewise with the fire scene. After the Fire Department personnel testified you didn't hear any argument about multiple setting of fires or the fact that the fire wasn't set. Once Trooper White clarified the position of Albert Benson in front of 92 State Street you didn't hear any argument about Albert Benson taking the shortest means to his automobile. That he was just out there in the ordinary course returning to his automobile. After the fire personnel testified about the cause of the fire, the setting of the fire, you didn't hear anything sug-

gested or argued about a cigarette setting the fire. They started out trying to suggest about a box and you heard about Chief O'Mara saying how the box wasn't the underlying source of that fire, wasn't the underlying source that charred the wall. And you saw the photograph moved away from the wall where it was protected by the box. You didn't hear any argument about that. The fact that the photographs were mistakenly identified as being taken at 10:20, that seemed to be suggested as a time. Was it suggested today? Is it suggested today? Is there any doubt in your mind that photograph was taken after the fire and there was some mistake when the time was put on the back of that photograph?

Visibility was important at the outset. Later on, after four or five people testified about visibility it was no problem at all and then also so important at the outset of the trial and cross-examinating the police officers. Was the motor oil box so significant at that point? That had to be the cause of the fire, that had to be how the fire started. You didn't hear any argument about that. You didn't hear after Bill Burke testified that that box was not in there that day, that he cleaned out that office and that box in fact was not in the building itself, that he had gone through the entire building. Was that important today?

I am sure if Mr. Burke wasn't here to testify today and testify and clarify to the jury the question of the access to 109 State Street, I am sure it would have been argued that they spent the evening in the basement. But that wasn't brought out earlier on in defense, they didn't ask Chief McCarthy about it. In fact, there was no argument about it at all because there is no access to the basement. As a matter of fact, they had to go upstairs.

There was a lawyer long ago once said when you can't try the facts, try the police.

Ladies and gentlemen, keep in mind the police are not on trial here. The police testified as to what they observed, what they saw. The people who are on trial are the defendants.

And you have one role, to decide their guilt or innocence. Are they guilty of the facts — and no outside factor, nothing outside of what you heard in the court, no sympathy, no anything. Just the facts you have listened to and heard in this short summation play a role in your decision of whether or not they are guilty of the charges set forth.

After hearing the charge, the law set forth by his Honor, and then apply those facts that you find to that law.

The Judge will instruct you on the law with respect to the responsibility we have, that we have to prove the degree of breaking and entering; that with respect to their testimony when they present evidence that people are working together in an effort, any act of one or anything done by one is admissible against the other.

So in this case where Viktor and Albert Benson, if you find, did go and plan and set that fire and did in fact set that fire or one of them set the fire, both of them are responsible for those acts.

Ladies and gentlemen, just keep in mind when Corporal Saccardo was sent to Kilby Street, it was approximately 9:30, it was after the car had arrived on Doane Street, it was after they received a listing of a Benson from Walpole. Keep in mind when Trooper White went to State Street, it was after a car had arrived on Doane Street it was after a listing of the Benson from Walpole was received. And it was after those two people were identified by the three people in the restaurant on Doane Street, Viktor and Albert Benson entered that building. Keep that in mind. Keep in mind also that the Fire Department wasn't on some patrol that evening, ladies and gentlemen. That it wasn't a fire district, that they were present with the police that evening.

And then, most importantly, ladies and gentlemen, keep in mind the fact that those individuals left that building between five or seven minutes before the fire was started.

Thank you again for your attention and I ask that you review the facts and on the basis of the facts I believe that the defendants can be found guilty of the charges set forth in the indictments that you have been reviewing.

Thank you.

PORTION OF COURT'S INSTRUCTIONS TO THE JURY.

THE COURT: All right, will counsel approach the bench.

You will remember there were four charges, two against each defendant, and the two crimes involved are what we call arson or breaking and entering. They are both identical against each defendant and 024293 which I am now reading is against the defendant Viktor Benson, which states that on December 20, 1978, did willfully and maliciously cause to be burned and did aid, cause or procure the burning of a building situated at 101 to 109 State Street, Boston, in the County of Suffolk.

I am now turning to Chapter 266, Section 2 of the general laws which set forth in the following language the definition of the crime. The literature says: "Whoever willfully and maliciously sets fire to, burns or causes to be burned or whoever aids, causes or procures the burning of a building, whether the same is the property of his or others, whether occupied, unoccupied or vacant, shall be guilty of a crime."

So the literature in Chapter 266, Section 2 has made this a crime of arson as set forth in that section to be a crime and Indictment No. 024294 charges Viktor E. Benson with the commission of that crime and Indictment No. 024296 charges Albert B. Benson with the commission of that crime of arson.

Now, 024293 charges that Viktor B. Benson on the same day did break and enter in the nighttime the building of Thomas Groom and Company, Inc., being situated at 101-109 State Street in Boston with the intent to commit a felony, to wit: arson.

Again I am referring to the General Laws, Chapter 266 and I am now referring to Section 16. And the literature there says: "Whoever in the nighttime breaks and enters a building with intent to commit a felony shall be guilty of a crime."

Again 024293 is the indictment that charges Viktor Benson with the commission of that crime and 024295 is the indictment that charges Albert Benson with the commission of that crime.

In summary then each of the defendants here are charged with two separate crimes. Each with the crime of what I have called, popularly referred to as the crime of arson and each have been charged with the crime that I popularly refer to as breaking and entering, and I will get into the details in a moment. But it's important to underscore the fact that you will have to deliberate on each crime separately and with respect to each defendant separately. That is your responsibility. They are separately charged and you must separately review the evidence and come to a verdict separately in accordance with that charge.

Now, let me talk to you for a moment about the elements of the crime of arson.

You remember I gave you the statutory language "whoever willfully and maliciously sets fire to, burns or causes to be burned or whoever aids, causes or produces the burning of a building, whether it's occupied or unoccupied, whether it's owned by him or another."

So this concept of willful in the statute simply means intentional, doing something that you intended to do.

The concept of malicious means done with an evil disposition, that is with a wrong and unwrongful motive or purpose. It means the willful or intentional doing of an injurious act without lawful excuse or without legal justification.

So the question here to you is to determine on the basis of all the evidence whether the Commonwealth has established each and every one of those elements. You are going to have to focus first when talking about the charge of arson, on whether or not the fire was a set fire or incendiary in origin. Because if it were not a set fire or not incendiary or whether, for ex-

ample, it is set by accident or by some cause not human, mechanical, whatever, it could not be a set fire, it could not be an incendiary origin and an essential element of the crime would not be present.

So you will have to examine the evidence, review the evidence, take into consideration the expert testimony, decide whether you are going to give it weight, disregard it and make a decision here whether or not the fire was a set fire or of incendiary origin. And if you have a reasonable doubt whether it was a set fire, that would be the end of your deliberations with respect to the matter of arson. If you decide that the Government has established that beyond a reasonable doubt, then you must decide whether or not it was the defendants and when I say the defendants you must decide that question separately. You must address that question to your analysis of the evidence to both Viktor and Albert Benson separately and decide whether the Government has convinced you beyond a reasonable doubt of their guilt.

Now, it might occur to you that only one person can set a fire and you have in mind the language of the statute says whoever aids, causes or procures the burning of the house. So that the law in effect is saying that you have to — you can be guilty if you set the fire or you can be guilty if you aid or cause or procure the setting of the fire.

So there has to be proof beyond a reasonable doubt that the defendant, and I am talking about you will have to consider these separately, associated himself with the criminal venture, that he appeared in some way with it, there must be evidence of concert between the defendant and the person who actually set the fire.

Now, mere knowledge that the crime is going to be committed is not enough. Mere presence in the area is not enough. There has to be action in concert with that person who actually set the fire. And you will have to make a determination

from all the circumstances and factors and whatever judgments about inferences you make as to whether the two defendants here were acting together in the firing of this particular building.

Now, the other crime which is charged is the so-called breaking and entering against each defendant and this also must be separately decided by you and in that particular case there are the following elements.

First of all, the Commonwealth has to establish that the crime was committed at night, and the law says that means one hour after sunset and one hour before sunrise.

Secondly, there has to be a breaking. A breaking would be accomplished by going through a closed window by opening, or by opening an open window further in order to gain access through it or by opening a closed door.

There is no requirement, as a matter of fact, that the door be locked but that it be closed and you open a closed door.

There has to be an entering. There has to be some part of — there has to be a part of the body entering and coming within the building to be an entry.

And finally, the fourth element there has to be an intent to commit a felony and in this case, to wit: arson.

Now, with respect to the intent to commit, obviously you can't see an intent, you have to decide whether based upon all the evidence as you find it to be, circumstantially, leads you beyond a reasonable doubt to find that state of mind within the defendants and to decide for each of them or both of them and to decide whether they intended to commit the felony of arson.

It isn't necessary with respect to this element of the crime that I am now talking about that the arson actually get committed but simply that they intended having broken and entered in the nighttime to commit the arson.

Those, then, members of the jury, are the elements of those crimes and you will have to review those elements and it becomes what you will, what Aristotle called sylboistic reason. If elements A, B and C are present beyond a reasonable doubt, then the defendant is guilty of the crime of arson, the defendant is guilty of the crime of breaking and entering in the nighttime, and that is the instruction.

NO. 83-255

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

ALBERT B. BENSON and VIKTOR E. BENSON,
Petitioners,

V.

COMMONWEALTH OF MASSACHUSETTS,
Respondent.

Petition for a Writ of Certiorari to
the Supreme Judicial Court for the
Commonwealth of Massachusetts.

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Although analysis of the two cases indicates that the issues of ultimate fact are not the same, should the doctrine of collateral estoppel bar the defendants' prosecution for conspiracy to commit arson solely because they were acquitted on the substantive offenses of arson and breaking and entering with intent to commit arson?

2. Does the doctrine of collateral estoppel present any obstacle to the Commonwealth's using, as part of its proof in its prosecution for conspiracy, the same evidence it introduced in its prosecution of the defendants for the substantive offenses of arson and breaking and entering with intent to commit arson?

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OPINIONS BELOW

The opinion of the Supreme Judicial Court for the Commonwealth of Massachusetts is reported at 389 Mass. 473 (1983) and is set forth beginning on page 1a of the petitioners' Appendix. The other pertinent opinions and findings and rulings are also accurately reflected in the petitioners' Appendix

JURISDICTION

In view of this Court's decision in Bullington v. Missouri, 451 U.S. 429, 437 (1981), which indicates that a state court judgment rejecting a petitioner's double jeopardy claim is "final" within the meaning of 28 U.S.C. §1257 and its decision in Abney v. United States, 431 U.S. 651, 657-662 (1977); and Harris v. Washington, 404 U.S. 55, 56 (1971) respondent is not dissatisifed with petitioners' statement of jurisdiction under 28 U.S.C. §1257(3).

STATEMENT OF THE CASE

Petitioners' statement of the case accurately reflects the pertinent information. This same information is set forth in the opinion of the Supreme Judicial Court. Accordingly, the facts will not be repeated herein.

Reasons For Not Granting The Writ

I. THE SUPREME JUDICIAL COURT PROPERLY REVIEWED ALL THE RELEVANT MATERIAL AND CORRECTLY APPLIED THE DECISIONS OF THIS COURT WHEN IT HELD THAT THE DOCTRINE OF COLLATERAL ESTOPPEL DOES NOT BAR PROSECUTION OF THE DEFENDANTS FOR CONSPIRACY TO COMMIT ARSON SINCE THE ISSUE OF ULTIMATE FACT IN THE PENDING CONSPIRACY TRIAL IS DISTINCT FROM THE ULTIMATE ISSUE IN THE DEFENDANTS' TRIAL FOR THE SUBSTANTIVE OFFENSES OF ARSON AND BREAKING AND ENTERING WITH INTENT TO COMMIT ARSON.

The defendants' peition is a veiled copy of the same argument which they presented to the Massachusetts Supreme Judicial Court, (A.1a); the Court of Appeals, (A.39a); District Court, (A.31a); and to two justices of the state trial court, (A.11a, 26a). On each occasion, the justices reached the same conclusion--that the pending prosecution is not barred by the doctrine of collateral estoppel. Once

again, however, the defendants' try to mine this vein and argue that the Commonwealth should be barred from the pending prosecution because the core of its case is the same as that in the previous trial. (Pet. 10).

The doctrine of collateral estoppel provides that once an issue of ultimate fact has been determined, that issue cannot be relitigated between the same parties in a subsequent case. Ashe v. Swenson, 397 U.S. 436, 443 (1970). But the doctrine only bars a prosecution in the instance when the jury could not have rationally based its verdict on an issue other than that which the defendant seeks to foreclose. Id. at 444. See Ottomano v. United States, 468 F.2d 269, 272 (1st Cir. 1972), cert. denied 409 U.S. 1128 (1973).

The burden falls on the one who seeks the doctrine's protection to establish that "the issue of fact which [he seeks] to foreclose from consideration in the subsequent proceeding was necessarily determined in [his] favor by the verdict in the prior proceeding." Commonwealth v. Shagoury, 6 Mass. App. 584, 589; appellate review denied, 376 Mass. 936 (1978), cert. denied, Shagoury v. Massachusetts, 440 U.S. 962 (1979).

The Supreme Judicial Court, as is required by the decisions of this Court, reviewed the entire proceedings as a whole, in a realistic and practical manner, to determine what issues were, or should have been decided at the first trial. (A.6a) See Sealfon v. United States, 332 U.S. 575, 578-579 (1948);

Ashe v. Swenson, supra. Moreover, in its review, the court was mindful that "a substantive offense and a conspiracy to commit that offense each constitute a distinct offense and each may be separately punished." (A.7a) Commonwealth v. French, 357 Mass. 356, 393 (1970). The court also recognized that an acquittal on the substantive offense will not automatically bar prosecution on the conspiracy to commit the same crime. (A.7a, 8a, 17a); Commonwealth v. Gallarelli, 372 Mas. 573, 576-577 (1977); Commonwealth v. Shea, 323 Mass. 406, 411 (1948); United States v. Cioffi, 487 F.2d 492, 498 (2nd Cir. 1973), cert. denied, Ciuzio v. United States, 416 U.S. 995 (1974); United States v. Lee, 622 F.2d 787, 790 (5th Cir. 1980). Additionally, the

court noted that at the time of the first trial, M.G.L. c.278, §2A restricted the simultaneous prosecution of the substantive crime and the conspiracy to commit the same substantive offense. (A.3a, fn3).

The defendants now argue that the Commonwealth is attempting to relitigate the issue of "identity" under the nominal rubric of conspiracy, an issue which they maintain was "necessarily determined adversely to the Commonwealth at the first trial." (Pet. 11,13,14) But the Supreme Judicial Court compared the evidence in the first trial to the proffered evidence in the pending case. See Commonwealth's Trial Memorandum, (A.82a) and Affidavit of Defendant's Counsel, (A.72a). Based on this comparison, it concluded that the

essential element in the arson trial was not identity, rather it was the wilful burning of the building and that in the pending conspiracy case, the key element will be the unlawful agreement. (A.7a) See M.G.L. c.255, §2; Commonwealth v. Niziolek, 380 Mass. 513, 526 (1980); Commonwealth v. Dyer, 243 Mass. 472, 483 (1922).

Petitioners also assert that the jury "conclusively established that [they] did not set the fire or aid, counsel and procure the burning of the building." (Pet. 12). Within this assertion, they criticize the Supreme Judicial Court for its failure to unequivocally determine the basis for the jury's verdict. They quote from the decision wherein the court said that "in accordance with the trial judge's

instructions, the jury may have acquitted the [defendants] because they concluded that the fire was not set or because they concluded that there was no active participation by the defendants with the person who set the fire." (A.9a).

When this language is examined in the context of the court's entire decision, it appears to be no more than dictum. It was clearly not intended to represent the court's unwavering explanation of why the jury found as they did. Even if this were the reason for the verdict, the pending prosecution would not be barred. When a court analyzes a case in the context of a collateral estoppel claim, its responsibility is solely to determine the issue of ultimate fact. It need not

glean from the verdict the precise reason the jury decided as they did.

There are additional reasons why petitioners' criticism of this dictum is unfair. What they now contend was "uncontroverted" (testimony that the fire was set) (Pet. 8) was something they never conceded as an indisputable fact during the trial. Moreover, the nub of their defense was to sow the seed that someone else who was in the building along with them at the time, was probably responsible for setting the fire; if it indeed was set. (Trial transcript 833-860) It is understandable, therefore, how the possibility of an accomplice in a joint venture arose. And it was likewise appropriate for the various reviewing courts to refer to this possibility and

the associated evidence as a factor which may have influenced the jury's verdict.

The Supreme Judicial Court noted in its decision the "difficulties often encountered with respect to a general verdict of 'not guilty'". (A.9a) United States v. Kramer, 289 F.2d 909, 913 (2nd Cir. 1961). It pointed out that it is "the rare case where it [is] possible to determine with certainty what the jury in the earlier prosecution had decided". (A.9a) United States v. Cioffi, 487 F.2d 492, 498 (2d Cir. 1973).

What the petitioners apparently fail to recognize is that a "finding of not guilty at a criminal trial can result from any number of factors having nothing to do with the defendant's actual guilt." (A.9a) Commonwealth v.

Cerveny, 387 Mass. 280, 285 (1982). Thus the fact that the court only alluded to two possible explanations of why the jury might have decided as they did is not determinative. The mere fact that the court only mentioned these two does not mean that all other reasons are necessarily excluded. See Commonwealth v. Cerveny, supra, at 285.

In the the end, the Supreme Judicial Court reasoned that the relationship between the result in the prior proceeding and the evidence proposed in the pending case is at best "tenuous and speculative", hence the doctrine of collateral estoppel is not implicated. (A.9a) The Supreme Judicial Court concluded that "since the jury may have reached its decision rationally on some issue of ultimate fact other than that

the defendants were not in any way responsible for the fire, the defendants have not met their burden of proving that this fact was necessarily determined by virtue of the general verdict of acquittal". (A.9a) See Commonwealth v. Shagoury, supra; United States v. DeVincent, 632 F.2d 147 (1st Cir.) cert. denied, 449 U.S. 986 (1980).

This conclusion accords with the findings of the state trial court and the district court. Both found that several rational bases existed which could explain the acquittals and that the verdict did not necessarily mean that the defendants bore no responsibility whatsoever for the fire. Furthermore, it was clear to them that the defendants were not acquitted of having made an unlawful agreement to commit the arson. (A.17a, 35a)

II. THE DOCTRINE OF COLLATERAL ESTOPPEL DOES NOT FORECLOSE THE COMMONWEALTH FROM USING THE SAME EVIDENCE IN THE PENDING CONSPIRACY TRIAL THAT IT INTRODUCED IN THE RELATED TRIAL OF THE SUBSTANTIVE CRIME SINCE THE ESSENTIAL FACTS IN THE TWO CASES ARE NOT THE SAME.

Generally the doctrine of collateral estoppel is invoked to bar a prosecution altogether. But it can also be marshalled to prevent the use in a subsequent proceeding of an argument or facts that establish an essential element already litigated in the defendant's favor in the first trial. (A.6a) See United States v. Lee, 622 F.2d 787, 790 (5th Cir. 1980); United States v. Cioffi, 487 F.2d 492, 498 (2d Cir. 1973). The doctrine, however, will not automatically foreclose in a conspiracy trial, evidence of overt acts which tend to prove the substantive offense just because the substantive

offense and the conspiracy stem from the same incident. (A.9a, 18a) Commonwealth v. Gallarelli, supra at 577; Commonwealth v. Shagoury, 6 Mass. App. Ct. supra at 588-590; United States v. DeVincent, 632 F.2d 147, 160-161 (1st Cir.) supra. Yawn v. United States, 244 F.2d 235, 238 (5th Cir. 1957) (Tuttle, Cir. J. concurring). Once again the defendant has the burden of establishing that the issue of fact which he seeks to foreclose from consideration was necessarily determined in his favor. (A.16a) United States v. Tramunti, 500 F.2d 1334, 1346 (1974); United States v. King, 563 F.3d 559, 561 (2d Cir. 1977); Commonwealth v. Shagoury, supra.

Petitioners mistakenly assert that the Commonwealth will try to prove the conspiracy by proving the commission of

the underlying offense. The Commonwealth's theory of prosecution is not so sinister. It does intend as part of its proof to introduce evidence in the conspiracy case that it used in the arson trial. Both the Supreme Judicial Court and the Court of Appeals has given it permission to do so. The Supreme Judicial.Court stated that there will be no bar to the introduction of this evidence which tends to create inferences that the defendants set the fire. (A.8a, 47a) Since the essence of the conspiracy is the unlawful agreement, the Commonwealth will argue that this agreement can be established in part using the circumstantial evidence surrounding the fire and whatever damaging inferences that may arise therefrom. The defendants

acknowledge that this is a permissible trial tactic. (Pet. 13) Attorney General v. Tufts, 239 Mass. 458 (1921); Commonwealth v. Shea, 323 Mass. 406 (1948); Commonwealth v. Binkiewicz, 342 Mass. 740 (1961). The Commonwealth's proof will go beyond being a mere reiteration of the evidence presented in the first trial. (See Commonwealth's Trial Memorandu, A.82a) The focus will be on the circumstantial evidence which suggests motive in the conspiracy. This evidence was neither presented nor available at the first trial.

To avoid any possible prejudice to the defendants' rights, safeguards do exist short of barring the prosecution altogether. The defendants will be able to object during the course of the trial at any time that they feel the doctrine

of collateral estoppel is being implicated. (A.47a) Furthermore, they are not precluded from requesting a cautionary of limiting instruction on why the evidence of the fire is being admitted.

Since the essential fact of the unlawful agreement was not an issue at the prior trial, the Commonwealth cannot now be required to truncate its evidence and eliminate those parts which might suggest that the defendants participated in an agreement to commit the crime of arson.

CONCLUSION

Respondent submits the Supreme Judicial Court correctly applied the decisions of this Court and that the doctrine of collateral estoppel in no way operates to bar the present prosecution. The questions presented by petitioners do not warrant review by this Court on certiorari and their petition should therefore be denied.

Respectfully submitted,

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